91-313

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

No. A-846

LARRY DODSON, et. al.,

Petitioners

-vs-

GENERAL MOTORS CORPORATION, et. al.,

Respondents.

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF THE APPEALS
FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. Did the decision of the Appellate Court deny the Petitioners (Plaintiffs/ Appellants) equal protection and due process of the law by affirming the approval of the Consent Decree by the Judge of the United States District Court for the Eastern District of Michigan, Southern District; which was in conflict with other circuits on the same matter and when the Consent Decree was neither adequate, fair nor reasonable? See Cox et. al. -vs- American Cast Iron Pipe Company, 784 F.2d 1546 (11th Cir. 1986); Holmes -vs- Continental Can Co., 706 F.2d 1144 (11th Cir. 1983), Hardin -vs- Stynchomb, 691 F.2d 1144 (11th Cir. 1982), quoting Culpepper -vs- Reynolds Metals Co., 421 F.2d 888, 891, (5th Cir. 1970); and the Supreme Court of the United States has not yet decided whether opting out of (b)(2) classes is ever permissible, and the circuit courts of appeals are split on the issue.

II. Did the Court of Appeals for the Sixth Circuit abuse its discretion by dis-allowing documentation at the appellate level which would support Petitioners position that the Consent Decree is inadequate, unfair and unreasonable?

LIST OF ALL PARTIES

Petitioners

1. Larry Dodson
2. Quester Adams
3. Delbert Lawrence
4. Irving Smith

Respondents

5. General Motors Corporation
6. Dennis Hazen Huguley, et. al.
7. All class members who approved the Consent Decree but are too numerous to list

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No. A-846

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LARRY DODSON, et. al.,

Petitioners,

-vs-

GENERAL MOTORS CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 22, 1991.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, reported as Dennis Hazen Huguley, et. al., (Class Action) / Larry Dodson, et. al., (Objectors-Class Action) -vs- General Motors Corporation, et. al., dated February 22, 1991, as yet unreported, which is the subject of this appeal.

The Opinion Approving Consent Decree and Order Denying Motion for Substitution of Counsel by the United States District Court

Eastern District of Michigan Southern Division dated September 1, 1989, as yet unreported.

The Order Approving Consent Decree by the United States District Court Eastern District of Michigan Southern Division dated September 11, 1989, as yet unreported.

JURISDICTION

The judgment and opinion entered on February 22, 1991 by the Court of Appeals for the Sixth Circuit. No petition for rehearing was filed. Application for extension of time within which to file a petition for a writ of certiorari was filed on or about May 4, 1991. On or about May 9, 1991, Justice Stevens signed an order extending the time to and including July 22, 1991. The jurisdiction of this Court was invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States provides:

Criminal actions - Provisions concerning - Due process of law and just compensation clauses. - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title VII of the Civil Rights Act of 1964, as amended.

Section 703.(a) provides: It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin

FEDERAL RULE OF APPELLATE PROCEDURE

Rule 3(c) provides: Appeal as of Right - How Taken

* * *

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 10 provides: Considerations Governing Review on Writ of Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another

state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

STATEMENT OF THE CASE

This case began with a class action complaint filed on July 15, 1983 by Laras Eason on behalf of himself and all similarly situated Black salaried employees against General Motors Corporation.

After several amendments to the class action, the third and final amendment alleged that defendant, General Motors Corporation, has utilized and continued to utilize, a performance appraisal system which has a racially discriminatory disparate impact upon plaintiffs in their class and which resulted in racially discriminatory disparate treatment of plaintiffs in their class with respect to the employment practices of promotion, demotion, lay-offs, recall, pay and transfer.

The plaintiffs are seeking declaratory and injunctive relief and to make whole those members of the class adversely affected by the policies and practices described in the complaint by providing appropriate back-pay, reimbursement for lost pension, social security, experience, training opportunities and other benefits in an amount to be shown at trial and other affirmative relief, including but not limited to an affirmative action program to eliminate the effects of the discriminatory practices complained of in plaintiff's complaint. To retain jurisdiction over this action; to assure full compliance with the order of the Court and within applicable law and require defendant to file such reports as the Court deem necessary to evaluate such

compliance; and grant plaintiffs and the class they represent, their attorney fees and costs and disbursements and grant such additional relief as the Court deems proper and just.

STATEMENT OF THE FACTS

The plaintiffs brought this action on behalf of themselves and other persons similarly situated pursuant to Rule 23 (a) and (b) 2 of the Federal Rules of Civil Procedure. The plaintiff filed the Petition for Certification of Class Action on or about August 25, 1983. The defendant filed pleadings in opposition to said Petition for Class Certification and motioned the Court for a Summary Judgment.

The district court certified the class pursuant to Fed. R. Civ. P. 23(b)(2) on October 16, 1986, over General Motors' objections. The Court issued an order on October 20, 1986 which stated the following:

> "For the reasons stated in my July 21, 1986 Memorandum Opinion, IT IS ORDERED that plaintiff's motion for class certification be GRANTED, and that defendant's motion for summary judgment be DENIED.
>
> IT IS FURTHER ORDERED that the class consist of all Black employees of General Motors Corporation in Michigan, Indiana and Ohio who were subject between October 8, 1982 and September 25, 1986 to General Motors' appraisal system for salaried employees except those employed in General Motors' Legal Department and those employed in General Motors' Personnel Department who are members of the designated defense team.
>
> IT IS FURTHER ORDERED that a subclass consist of all Black employees of General Motors Corporation in Michigan, Indiana and Ohio who were subject between October 8, 1982 and September 25, 1986 to General Motors' appraisal system for bonus-eligible salaried employees except those employed in General Motors' Legal Department and those employed in General Motors' Personnel Department who are members of the designated defense team, and those who opt out pursuant

to notice, which counsel are instructed to prepare forthwith.

IT IS FURTHER ORDERED that members of the class or subclass employed in General Motors' Personnel Department, other than those designated members of the defense team, be subject to the following rules:

(a) Counsel for General Motors may contact them directly about matters related to this lawsuit, but may not communicate with them concerning their personal employment situation;

(b) Plaintiff's counsel may not communicate with them in the Personnel Department concerning matters directly related to this lawsuit.

The defendant challenged the certification of the class and filed a petition for a writ of mandamus with the United States Court of Appeals for the Sixth Circuit. The petition for mandamus was not granted, but the Court of Appeals ordered an evidentiary hearing. That order was vacated when the Court of Appeals realized that it had not received the brief of plaintiff class before taking action.

The parties then engaged in extensive discovery. Personnel files of 500 randomly selected Black and White salaried employees were furnished to the plaintiff class and, thereafter, computer tapes containing personnel information on all past and present General Motors employees who worked in the tri-state area from 1982-1986 were provided.

Depositions of General Motors officials, concerning the operations of the salaried employee appraisal systems, the training provided to supervisory personnel in connection with these systems were taken and the analysis of the results were also undertaken by the plaintiff class.

During 1988, settlement negotiations were carried on continuously from July through late October. A settlement agreement was reached in principle on October 21, 1988. A proposed consent decree was submitted to the Court on January 29, 1989.

A hearing was held on January 31, 1989, whereas, Dennis James, Esq., and Ronald Robinson, Esq., appeared on behalf of the plaintiffs. Ronald Riasti, Esq., also appeared on behalf of the plaintiffs. Barbara Berish-Brown, Esq., appeared on behalf of the defendant. Whereas the Court stated:

THE COURT: Off the record for a moment. (A brief discussion was held off the record)

THE COURT: We are here today to discuss whether or not this being a 23 B. 2 class, a notice should now be sent to the members of the class giving them an opportunity to opt out so far as their case is concerned. I think that under the case law as I read the rule that is discretionary. And it would seem to me that in this particular case, since the matter is now over five years old, and since we have had numerous hearings on this matter, that the interests of justice would be served by not sending a notice at this stage, to members of the class giving them the right to opt out. I suggest rather an alternative procedure. And that is that I will approve the settlement to all members of the class, and a hearing will be set for purposes of taking objections. And at that time, should there be any tenable objections, we can address those. I don't think we need the opt out provision in order to do that. And if anyone wants now on the record to make any statement about that, you are welcome to do so. But I would like to have your, at least consensus here as to whether or not you agree with me on that approach.

What do you think Mr. James?

MR. JAMES: Dennis James attorney for plaintiffs. Assuming that at the time we encounter such objections, if we do, that the opt out remains an option still with the Court, then I would agree.

THE COURT: Maybe this is a simplistic view of the matter. Do you agree?

MS. BROWN: I agree with your method.

THE COURT: Maybe this is a simplistic view of the matter. I plan to regard Rule 23 as just a remedial rule, a tool by which in a multiple plaintiff case you have got a remedy. I think we can use it flexibly. And let's address problems only if they come up. Let's not anticipate them coming up. I sometimes think that these notices to opt out make for more trouble than they're worth. Okay. What's the next step then. You will send out the notice if there's something that I have to sign.

The Court preliminarily approved the proposed consent decree by order of February 3, 1989. Notice was given to all members of the class that objections to the proposed consent decree were required to be filed by March 31, 1989.

Plaintiff, Larry Dodson, petitioned the Court for extension of time to file specific written objections. Plaintiff class, by their attorneys, LOPATIN, MILLER, FREEDMAN, BLUESTONE, ERLICH, ROSEN & BARTNICK, P.C., and RONALD REOSTI & ASSOCIATES, filed their opposition to the verified petition for extension of time to file specific written objections submitted by named plaintiff Larry Dodson. Defendant also filed a written response in

objection to named plaintiff Larry Dodson's petition for extension of time to file specific written objections.

A hearing was given on or about April 3, 1989. The following appearances were: Dennis James, Esq., Ronald Robinson, Esq., and Ronald Riasti, Esq., appearing on behalf of the plaintiffs. Barbara Berish-Brown, Esq., and Mark Flora, Esq., appearing on behalf of the defendant. Also appearing were Erline Baggett, Esq., and Larry Dodson, Class Member/Plaintiff.

The hearing began in the following manner:

THE COURT: Do I understand correctly in this petition to extend the time for the hearing on the entry of the proposed consent decree, that -- you're Mr. Dodson?

MR. DODSON: Yes, sir.

Now again, this is after the fact because my letter was dated March the 22nd, which indicates that he would have talked to them before this was sent out because he states so in the letter. These two notices which I received this morning, one dated March the 31st, are after the fact. And the very thing that I am being accused of, of doing something without regard of contacting the attorney or the plaintiffs has occurred here.

For the record, as of -- I am sorry I said that already. I really think the question of the extension is the key. The key basically is in the objections. Mr. James told me that I was overreacting to recent job assignment and promotions in the Indianapolis area, when in fact the decree states that GM has the option, if this was approved, to put it in place either in 1989 or 1990, further giving us concerns with regard to the sense of fair play

that was -- has been pointed out to us because there were promotions. There were people put in positions with less seniority. And these were basically positions that we felt would have been open to Black salaried employees, assuming the decree had been passed.

But I cite as additional reason for my position, also letters from the people of Ohio, people from Indiana and also I have mailings from Michigan. Maybe I watch TV too much, but sometimes cases are won at the last minute due to new found evidence.

In this case, two of the plaintiffs and attorney James ask where were these people six years ago. I can't answer that. But the deadline was March the 31st, and the people did respond. On one hand, the decree tells them that we have the opportunity to object if we wish. And on the other hand the attorneys don't encourage that. If the position I am taking is wrong, because I don't know any better, I apologize for not knowing better. But I am not speaking -- I am speaking for the many people that are involved simply because they are Black salaried employees. Those who are suffering goes far beyond the areas covered by the decree. I thank you for your patience in allowing this opportunity to expose those concerns to you.

THE COURT: Your petition says to and including April 30th; is that correct?

MR. DODSON: Yes.

THE COURT: You are petitioning for this extension,

notwithstanding the fact that you are represented by counsel?

MR. DODSON: Yes.

THE COURT: That is a little unusual, but it's certainly something I can understand. What is the reason for the extension, Mr. Dodson?

MR. DODSON: Your Honor, if I may come forward.

THE COURT: Go ahead, Mr. Dodson.

MR. DODSON: My name is Larry Dodson, and I basically request your assistance because I am no attorney. But what I am speaking of is, on behalf of what I feel and also representative of class members from the State of Indiana, and I feel likewise of other class members with regard to this lawsuit. And since you bear with me, allow me to read -- in trying to cover everything in an adequate manner, I feel that I need to read this so I don't miss any details.

THE COURT: You do it the way you feel most comfortable.

MR. DODSON: The reasons for the request for extension, to adequately answer, would require going into a bit more information regarding the reason for taking this position. If the notice I received, petition of denial, has any bearing on your decision to allow an extension, please allow me the opportunity to read this information. I received notice late Friday night that the hearing had been set. If you ask any of the plaintiffs that would testify, they would testify that I was never fully agreeable to the terms of the decree, nor did I sign anything. I felt that it would not be beneficial until we heard any objections which might have come up from you.

Okay. We were pressured for an answer to close this thing out. And at one point we were told that we would be getting back to the class with the terms of the proposed package to avoid counterproductivity of spending a lot of money mailing a decree out only to have someone file an injunction to stop the proceedings. That preliminary notice of discussion with class members never took place. The only time I was told that all ten thousand people had been communicated with was when the final decree capsule was mailed from GM. My bearing to the pressure of the negatives coming from our attorney, and to keep our calls from further causing further division between the plaintiffs, Mr. James, this decree allows for the class members to object. And I felt that at the time the people were going to come forward that they would be, this would be their last chance.

As of March 6th, some still had not received a notice. A good number of people by way of rumor to -- previous, that the notices had been sent out. Blacks thought it had been settled. Some Blacks thought it had been settled. They also felt that it was too late to do anything. And some heard it, and some feared if they objected, they would be disqualified. Along those lines it was really not specific.

In addition, plaintiffs did not address or did not have addresses and names of class members to communicate that information. Plus the people who are afraid of losing their jobs, which I fear could possibly happen to me as well.

Number seven, on March 18th, 1989, the undersigned, along with named plaintiff

James Kennedy, president of the Pro-Minority Action Coalition, appeared in Indianapolis to explain and answer questions with regard to the proposed decree per notice to Larry Dodson on March 9th. I agree that took place. And number eight, given that all the above circumstances 30 days from the filing or from the date of the mailings of February 28th, that is sufficient time for class members of Indiana to decide whether or not to file an objection. And based on that statement there, I feel that there was not a complete 30 days allowed, in that some people received this notice as late as March 6th, some people did not receive it until as late as March 19th. I understand in the Michigan area, some people did not receive it at all. So we do not in fact have that full 30 days to allow people time to object. The letter of petition from Barbara Brown, Mark Flora states, the other named plaintiffs and their attorneys who represent the class in this case are opposed to the petition. And also, in the first letter that I received from attorney James, it also states, this says wherefore, plaintiffs, pray the petition of Larry Dodson be denied as late as March 26th. I talked with Reverend James Kennedy, and also Larry Kitchen, and neither one of those gentlemen were knowledgeable of the petition for denial had been petitioned to you. And them not knowing this, I said I made that call, I also tried to contact Dennis Huguley which I had trouble reaching him. And to further add to that, that even as late as this morning I received copies from attorney Dennis James where Larry Kitchen and also Dennis Huguley had basically signed papers which agreed that they were against this denial.

With reference to Mr. James' petition, item

number one, we regard to the petition. It stated that Larry Dodson agreed -- item number one, that Larry Dodson agreed to submission of the proposed consent decree agreed to submission of the proposed consent decree to the Court with provisions of a 30-day period for filing objections. Response to that, I agreed under extenuating circumstances. I even went back to explain that considering what was explained to me that this may be the best that could be done, knowing in my heart that it was not acceptable for all concerned, I even told the attorneys, plaintiff class members would not go along with this.

Item number two, that Larry Dodson has filed this petition without consultation or consent of the other named plaintiffs and counsel for the plaintiff class. My response to that, I did inform counsel and plaintiff that objections were arising. When I told Reverend Kennedy, he said he wanted it to be over. He was tired. He felt that it should be accepted, but he would not stand in my way. And by "in my way", I mean that if people objected he would not discourage it. When I told Mr. Kitchen, he said he would not play a part in it -- with these hearings until he was convinced otherwise and that he had seen the numbers of people that would indicate there was a change here. But he also said that he would not stand in my way. I was not able to reach Dennis Huguley.

Number three, after the mailing of approximately ten thousand notices, February 28th, only 23 Indiana mailings have been returned undelivered. I was informed by the Black salaried employees, some had not received notices. Also, that a White employee had received a copy of the

decree.

Number four, as indicated in the notice to the class, exhibit 'H' of the decree, a number of counsel for the plaintiff class has provided to class members to call if they have any questions regarding the decree. People from Indiana stated that they had called the office with questions and were not satisfied with the answers. The same was true of some people from the Ohio area. As mentioned earlier, someone who appeared to be a secretary, said that Ms. Fabian was not in and that she could answer the questions.

Number six, the Indiana chapter of Pro-Minority Action Coalition, a client organization supporting this litigation, whose chapter president is Larry Dodson, held its regular meeting to discuss this decree, March the 11th, per statement to the undersigned by Larry Dodson.

The reasons on negatives given by our attorney included lack of participation, lack of finances, a pending bill for some $200,000. The statement that if we went to court we would look to spend another couple hundred thousand dollars if we went to court. And if we were successful, GM would appeal. Something might happen to you, Judge Feikens, plus if I understand correctly, the company tried to basically have your decision overturned. Then we plaintiffs were told that Feikens doesn't award large settlements, and he does not make people rich at the sake of other class members.

Less than a week, we had less than a week to review the preliminary draft to be done by four people in four different cities who do not know or have the expertise to understand

everything written. Just the same as the -- just the same as the class members didn't completely understand. What they were reading, your Honor, I am one of the four people who represent the class. When I do stop, when I do stop representing the class members, the class members of the State of Indiana made their wishes known by objecting. Before much of this took place, I requested a list of the names and addresses to communicate with the class members as a plaintiff representing the class. I sure that their request was within reason. I was told in no uncertain terms, no, that I would not be given that information.

I was also asked what I was going to tell them. I was also asked who was going to finance it. I was asked where were these people the last six years. It's my position that regardless to where they were in the last six years, the Courts allow for them to object if they wish. Even Reverend Kennedy made the statement as we all did, including Mr. James, if there had been more money to cover bills, more demands could have been made and a better package received.

I was also told this wasn't a settlement as much as it was a compromise. Let me say that my first -- not regarding the petition to you for denial for the request of an extension to my surprise came from our attorneys, with a copy and comments going to GM attorney dated March 22, 1989, which I received March 25, 1989. March 29th I received basically the same thing from Barbara Berish-Brown, Mark Flora. Much of the cited items came from the -- came from Mr. James' petition. I expected something like this to happen, but I expected it to come from GM initially.

The Court granted the petitioner, Larry Dodson, an extension to and including April 13, 1989.

On or about June 23, 1989, plaintiff/objectors by counsel, Godfrey J. Dillard, filed a memorandum in opposition to approval of proposed consent decree. Said petition stated that the trial court will abuse its discretion if it approves the proposed consent decree, because it fails to provide for an opt-out provision and taken as a whole is not fair, reasonable nor adequate.

A hearing on objections was noticed for and held on June 26-27, 1989. Plaintiff, Larry Dodson, motioned for substitution of plaintiff's counsel. A hearing was held on Friday, August 11, 1989. The Court issued an Opinion approving Consent Decree and Order Denying Motion for Substitution of Counsel on or about September 1, 1989. In its Opinion, the Court held that the Consent Decree resolves all claims of race discrimination asserted in, or in any way placed in issue by, the third amended complaint. This includes all claims related to any alleged racially discriminatory purpose, adverse impact or effect of the General Motors appraisal system for Black salaried employees in the tri-state area or in any way related to race discrimination in promotions, pay, demotion, transfer, lay-off, recall or other personnel decisions, including alleged retaliation for participation in this suit and from any claim for attorney fees and costs.

The Consent Decree provides the following: A monitoring system which adjusts for imbalances that may occur in the five-year period by providing that as of the monitoring date for each reporting period (a calendar quarter in the five-year term of the decree), the percentage of discretionary salary increases for Black salaried

employees in the tri-state area and the percentage of discretionary salary increases for all other salaried employees in the tri-state area will be calculated for each salary level.

For any level at which the difference in the percentage of discretionary salary increases for Black salaried employees when compared to the percentage for non-Black salaried employees exceeds 2 standard deviations, adjustments to the salaries of Black salaried employees on the level, for that year, will be made to achieve a difference of no more than 1 standard deviation.

The consent decree states how adjustments will be administered in accordance with the salary administration plan in effect for the year in which the differential occurs.

Promotions likewise are monitored for each level by comparing the percentage of actual Black promotions by level in the tri-state area to the percentage of expected Black promotions generated by a computer model. If these promotion goals are not satisfied, then certain catch-up goals will be established.

The decree provides the methodology for monitoring these promotions as well as a procedure for adjustments. Important to the monitoring system is a provision that if, for any two consecutive reporting periods, the tri-state figures show that the percentage of actual Black promotions in a given level differs from the expected percentage of Black promotions by more than 1.5 standard deviations but less than 2 standard deviations, the underlying data for that level for the two periods will be aggregated. If the aggregated data reveal a difference between the percentage of actual and expected Black promotions of more than 2 standard deviations, but less than 3 standard deviations, then the number of promotions of Blacks required

to bring the shortfall within 1.5 standard deviation will be the catch-up number for the next period.

If the aggregated data reveal a difference between the percentage of actual and expected Black promotions of more than 3 standard deviations, then the catch-up goal for the next reporting period will be the number of promotions required to bring the difference within 2 standard deviations.

The decree provides for a detailed, written, annual report to plaintiff's counsel concerning the group monitoring system and methods by which the report can be reviewed and challenged.

With regard to the commitment of General Motors to attain the promotion goals and/or catch-up promotions, insofar as that commitment is subject to the availability of qualified and interested Black candidates for promotion, General Motors may assert a good faith explanation.

The decree contains a detailed method for individual monitoring so as to provide a procedure for any employee who disagrees with his or her group/ranking.

Finally there are miscellaneous provisions with regard to notice, modification, confidentiality, restrictions on future activities of attorneys and experts for the plaintiff class, and provisions regarding construction and enforcement of the decree.

It provides that it shall be effective and binding for a five-year period from the time the decree has finally been affirmed.

As indicated, the heart of this consent decree is the group monitoring system. It provides significant affirmative action relief. The monetary relief is secondary, and any consideration of monetary relief must be balanced with the massive potential relief provided in the

group monitoring system.

The consent decree also provides monetary relief to certain ex-employee class members, including ex-employees involuntarily terminated, a one-time salary adjustment for certain incumbent employee class members, for named plaintiffs, for anecdotal witnesses for former anecdotal witnesses and for potential anecdotal witnesses and for attorney fees and costs. The details of the decree providing monetary relief are discussed below in that portion of the opinion dealing with objections.

Plaintiff class consists of nearly 10,000 Black salaried employees in Michigan, Ohio and Indiana. Approximately 15°~ of the plaintiff class filed objections. May of these objections were identical in form; many employees objected to the decree's requirement of a general release by those employees receiving money benefits and that the monetary relief for the employee class was neither equitable nor adequate. Another group, again in the identical form, objected to the fact that General Motors did not admit to unlawful conduct, that employees involuntarily released could not receive an award, that all incumbent employee class members should be given some monetary compensation, and that the proposed monitoring system is vague. They also claimed that the consent decree would stifle individual claims for relief. Other objectors claimed that the good faith defense permitting General Motors to explain a failure to meet the group monitoring system goals was too vague.

An analysis of the objections indicates that the overwhelming number of complaints claim that monetary relief is insufficient. While the relief provided in the group monitoring system provides major relief to the class, the objectors focus primarily on the lack of adequate

compensation for alleged past discrimination.

Objection was made also that the consent decree fails to provide for an opt-out of individuals who desire not to be bound by the provisions of the consent decree. The court certified this class in accordance with the provisions of the consent decree. The court certified this class in accordance with the provision of Federal Rules of Civil Procedure 23(b)(2) (FRCP 23 (b)(2)). This case reflects a typical FRCP 23(b) (2) class action settlement. Plaintiff class sought correction through affirmative action in the group monitoring plan for an imbalance allegedly caused by reason of discrimination in promotions and salary adjustments. By their negotiations and settlement the parties have agreed that the prerequisites for the certification and maintenance of the class action are clearly satisfied. Common questions of law and fact substantially predominate, and the claims of the named plaintiffs are typical of the claims of the class. The named plaintiffs do fairly and adequately protect the interests of the class, and their current counsel are skilled in the handling of employee discrimination cases. The requirements for certification under FRCP 23(b)(2) are satisfied.

The monitoring system provided for in the consent decree was criticized by the objectors. It is significant that criticisms of the monitoring system were largely conclusory. The court finds that the group monitoring system devised in this consent decree is innovative. The system requires that discretionary salary increases and promotions to Black employees shall not deviate more than 2 standard deviations from those of comparably qualified White employees at each pay level of each year for a five-year monitoring period. Essentially the design is that a computer will generate a White employee model

of success with respect to discretionary pay increases and promotions and then apply that model to the comparable Black employee population to reach an expected number of pay increases and promotions.

Certain objectors pointed out that the monitoring should be on a facility-by-facility basis rather than on a company-wide basis at each employment level. It appears to the court that a company-wide population for each level would more clearly permit discriminatory patterns to emerge.

The objection that the five-year monitoring period is too short is without merit.

The claim is made that 2 standard deviations allow too much leeway in the monitoring plan. It is clear that 2 standard deviations are a widely accepted statistical range applied when considering whether employees have engaged in discrimination. Hazlewood School District -v- U.S., 433 U.S. 299 (1977); Castaneda, Sheriff -v- Partida 430 U.S. 482 (1976).

PROCEEDINGS BELOW

The Consent Decree was approved by Order of the U.S. District Court Eastern District of Michigan, Honorable Judge Feikens on September 14, 1989.

A "Joint Notice of Appeal" was filed by Godfrey J. Dillard Esq., in "Larry Dodson, et. al., -v- General Motors Corporation" on behalf of "Larry Dodson, et. al.".

The objectors make the following arguments: (l) the class of objectors has standing on appeal; (2) the trial court abused its discretion when it failed to allow members of the class to opt-out, after certifying this as a class action pursuant to Fed. R. Civ. P. 23(b)(2)

and (3) the trial court abused its discretion when it approved the consent decree over the objections of 15 percent of the plaintiff class because both the compensation afforded and the monitoring system provided by the consent decree were inadequate.

The appellate court found the Objectors' arguments without merit and, accordingly affirm.

However, the appellate court stated in reference to standing the following:

> "Although defendant argues that the Objectors lack standing to appeal the terms of the consent decree, we choose nonetheless to address the merits of the issues raised by the Objectors. In light of the fact that we find the Objectors' claims wholly without merit, our assumption in favor of standing for the Objectors is without consequence and should not be construed as a decision on the merits on the standing issue."

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's holding that the policy in favor of not allowing class members to opt-out of 23(b)(2) class actions stems from concern that "defendants would not be inclined to settle where the result would likely be a settlement applicable only to class members with questionable claims, with those having stronger claims opting out to pursue their individual claims separately." Kincaide v. General Tire & Rubber Co., 635 F.2d 501, 507 (5th Cir. 1981). Thus, "lawsuits alleging class-wide discrimination are particularly well suited for 23(b)(2) treatment since the common claim is susceptible to a single proof and subject to a single injunctive remedy." Senter v. General Motors Corp., 532 F.2d 511, 525 (6th Cir.), cert. denied, 429 U.S. 870 (1976). Additionally, the Sixth Circuit stated, "in the interests of judicial economy and efficiency," i.e., to avoid needless

duplicative suits, courts should generally certify classes pursuant to 23(b)(2) when the class members are seeking injunctive relief, and correspondingly, now allow class members to opt out. Laskey, 638 F.2d at 956.

The Sixth Circuit's decision in this case is in conflict with the Eleventh Circuit's, in which the Eleventh Circuit stated in Cox et al. -v- American Cast Iron Pipe Company, 784 F.2d 1546 (11th Cir. 1986) the Court held that while an employment discrimination class action might appropriately be certified under (b)(2) as a case in which "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole" nevertheless, if, at the relief stage, there is, in addition to the aforementioned injunctive and declaratory relief, individual monetary awards in which the interest of some class members may be in competition with the interests of others, a opt-out provision is called for.

Appellant's case is quite similar to Holmes -v- Continental Can Co., 706 F.2d 1144 (11th Cir. 1983). In Holmes, certain class members attempted repeatedly to opt-out or more precisely, to avoid becoming part of the class at all. Objectors to this settlement moved in the District Court that opt-out procedures be established for class members dissatisfied with the monetary aspects of the proposed settlement. The district court denied the motion, concluding that the fairness hearing provided the objectors a "means of litigating all of their individual claims, including claims for higher back pay, or for back pay, or any other individual relief." Because many monetary claims in this case are unique to individual class members, we hold

that the right to opt-out of the class, normally accorded only to members of classes certified under Rule 23(b)(3), must be extended to all members of this (b)(2) class.

Civil rights class actions, including those brought pursuant to Title VII, are generally treated under subsection (b)(2) of Rule 23. See Kincaide -vs- General Tire & Rubber Co., 635 F.2d 501 (5th Cir. 1981). The Appellants acknowledge that this case was properly certified as a (b)(2) class action. Subsection (b)(2) contemplates class cases seeking equitable injunctive or declaratory relief, and back pay comes within the ambit of (b)(2) because the "demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy, to be determined through the exercise of the court's discretion." Johnson -v- Georgia Highway Express, 417 F.2d 1122, 1125 (5th Cir. 1969). See also Pettway -v- American Cast Iron Pipe Co., 494 F.2d 211, 256-57 (5th Cir. 1974) Pettway III., cert. denied, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed2d 74 (1979). This case does not require us to re-examine the Johnson-Pettway characterization of back pay as equitable relief and thus cognizable under subsection (b)(2). The Johnson-Pettway line of cases reflect our conviction that Title VII and the class action rule should be construed so as to further the strong public policy of eradicating all vestigages of racial discrimination in employment. This court and the cases binding on this court have consistently recognized that discrimination in employment is "one of the most deplorable forms of discrimination known to our society, for it deals not just with an individual's sharing in the 'outer benefits' of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies or chooses." Hardin -vs-

Stynchomb, 691 F.2d 1364, 1369 (11th Cir. 1982), quoting Culpepp
-v- Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970).

The United States Supreme Court has not yet decided wheth
opting out of (b)(2) classes is ever permissible, and the circuit cour
of appeals are split on the issue.

In Penson -v- Terminal Transport Co., 634 F.2d 989 (5th Ci
1981), the Fifth Circuit held that "although a member of a cla
certified under Rule 23(b)(2) has no absolute right to opt-out of th
class, a district court may mandate such a right pursuant to i
discretionary power under Rule 23." 634 F.2d at 993. This holdi
followed from Pettway III, where the court reasoned that Title V
claimants "dissatisfied with their portion of the (back pay) awa
should be allowed to opt-out in order to prove that they were entitl
to a larger portion."

The Penson and Pettway decisions represent
acknowledgement that the monetary relief stage of a Title VII ca
often "begins to resemble a 23(b)(3) action" and that courts ha
shown increasing "concern with providing the due process of rights
the individual class members." Penson, 634 F.2d at 994. Similar
in Officers for Justice -v- Civil Service Commission, 688 F.2d 61
634-35 (9th Cir. 1982), a Title VII class action certified und
subsection (b)(2), the Ninth Circuit allowed opting out in part becau
"given the breadth and nature of the claims asserted, the cla
allegations in plaintiff's complaint, and the procedures adopted by th
district court, it appears clear that this case was in essence a Ru
23(b)(3) class action." Monetary awards may give rise to conflicts
interests within the class, especially when certain class membe
attempt to resolve their individual claims simultaneously with th

class claims.

It is the contention of the Petitioners (Plaintiffs/Appellants) that the trial court erred or abused its discretion by not giving the class members the right to opt-out in this cause of action and the appellate court in affirming the district court's action continued such error. The Petitioners (Plaintiffs/Appellants) further contends that the lower court erred and abused its discretion by not considering and characterizing this class action as a "hybrid".

The Sixth Circuit stated that:

> "The district court concluded that the thrust of affirmative relief for current employees is the computer monitoring system and the changes in the disparate treatment of Black salaried employees that it will promote."

We agree.

The Sixth Circuit further stated that:

> "The entire purpose of the monitoring system is to draw General Motors' attention to areas in which there is a disparity in the treatment of Blacks as compared to Whites. The plaintiff class' complaint alleged that there were disparities along racial lines in General Motors' performance appraisal system as they related to promotions, demotions, layoffs, etc. The monitoring system addresses precisely these concerns."

The Petitioners and his fellow Objectors disagree with the district court's and the appellate court's evaluation of the monitoring system and state that the monitoring system is neither fair, adequate nor reasonable and it is not innovative. The reason it is not innovative is because a similar monitoring system was in effect during the period of discrimination of the class. The General Motors Corporation had

entered an agreement with the Office of Federal Contracts Compliance Programs of the Employment Standards Administration in the United States Department of Labor (OFCCP) providing for a similar monitoring system known as the National Reporting System for General Motors Corporation as the one that the lower court approved in this cause of action. The Petitioner asks "how can the attorney for the class be able to determine if General Motors Corporation is fulfilling its obligation under the monitoring system as far as promotion and salary increases, and not discriminate against the class members when the Office of Federal Contracts Program (OFCCP) who are trained to be able to detect discrimination was unable to do so while their agreement with General Motors was in effect?"

The Petitioner further states that the monitoring system developed by General Motors Corporation in the Consent Decree should not be approved because it is not reasonable and not in the public interest. The primary concern is the base line established at the 2 standard deviation level. In hiring and promotion cases, the Courts have held that the base line for making statistical comparison has been between the racial composition of the qualified person in the labor market and the person holding at issue jobs. (Hazlewood School District -v- United States, 433 U.S. 299, 307-308 (1977). The Supreme Court held that absent discrimination, the minority utilization should approximate minorities in the communities.

Under the 2 standard deviation system, the minorities utilization will never approximate minorities in the community. The monitoring system under the Consent Decree allows General Motors Corporation to utilize the good faith as a defense when they fail to fulfill their obligations under the monitoring system.

The Petitioner (Plaintiffs/Appellants) further contend that General Motors Corporation has a federal contract presently in effect, as well as during the period of the alleged discrimination with the United States Government exceeding fifty thousand dollars ($50,000.00) a year, which required General Motors to take affirmative action under Executive Order 11246.

Under Executive Order 11246, General Motors is required to develop a written affirmative action compliance program for each of its establishments. An affirmative action program is a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort. The objective of those procedures plus such efforts is equal employment opportunity. An acceptable affirmative action program must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to achieve prompt and full utilization of minorities and women, at all levels and in all segments of its work force where deficiencies exist.

Affirmative action programs must contain the following information:

(a) Workforce analysis which is defined as a listing of each job title as appears in applicable collective bargaining agreements or payroll records (not job group) ranked from the lowest paid to the highest paid within each departmental or unit supervision.....

(b) An analysis of all major job groups at the facility, with explanation if minorities or women are currently being underutilized in any one or more job groups ("job groups" herein meaning one or a group of jobs having

similar content, wage rates, and opportunities). "Underutilization" is defined as having fewer minorities or women in a particular job group than would reasonably be expected by their availability. In making the utilization analysis, the contractor shall conduct such analysis separately for minorities and women.

(1) In determining whether minorities are being underutilized in any job group, the contractor will consider at least all of the following factors:

(i) The minority population of the labor area surrounding the facility;

(ii) The size of the minority unemployment force as compared with the total work force in the immediate labor area;

(iii) The percentage of the minority work force as compared with the total work force in the immediate labor area;

(iv) The general availability of minorities having requisite skills in the immediate labor area;

(v) The availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;

(vi) The availability of promotable and transferable minorities within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the

> contractor is reasonably able to undertake as a means of making all job classes available to minorities.

The goals and timetables developed by the contractor should be attainable in terms of the contractor's analysis of its deficiencies and its entire affirmative action program. Thus, in establishing the size of its goals and the length of its timetables, the contractor should consider the results which could reasonably be expected from its putting forth every good faith to make its overall affirmative action program work.

The Petitioner and Objectors assert that the awards for back pay and salary increases are inadequate. The district court enumerated these awards as follows:

> Of nearly 10,000 class members, approximately 2,800 are ex-employees who will share in a pool of $1.16 million, depending on the number of claims filed.... Fourteen percent of the incumbent employee class whose salaries are furthest below statistical white salaried employees will receive first-year base salary adjustments ranging between $800-1,200. This equals a first year distribution of base salary increases of $1 million to approximately 1,000 incumbent employee class members...

It is the contention of the Petitioner (Plaintiffs/Appellants) that the monetary relief for the employee class was neither equitable nor adequate. It is also the contention of the Plaintiff/Appellant that only a small number of the class members will benefit from the monetary relief. The Petitioner (Plaintiffs/Appellants) also object to the manner that the attorneys for the class distributed the monetary award in the manner that they did. The attorneys for the class took it upon themselves, without the assistance of the named plaintiff, nor other

class members, to assist them in making the distribution to the class members. In the opinion of the lower court approving Consent Decree, the Court stated the heart of this decree is the group monitoring system. It provides significant affirmative action relief, the monetary relief is secondary, and any consideration of monetary relief must be balanced with the massive potential relief-provided in the group monitoring system. The Petitioner (Plaintiffs/Appellants) and his fellow class members totally agree that the Court's assessment concerning future benefits are false. In an article dated November 22, 1989, that appeared in the Wall Street Journal, it was reported that the General Motors Corporation in a renewed effort to streamline its costly bureaucracy in the face of slumping sales and intensifying competition, is looking to cut its U.S. white-collar work force by as much as 25% in the next four to five years. Continuing, the article states, "the details of GM's plans haven't been finalized or even announced formally to company employees. But GM hopes to eliminate about 5,000 white-collar jobs a year, or as many as 25,000 in total, as part of a five-year business plan."

This article certainly supports Petitioner (Plaintiffs/Appellants) position that the Consent Decree offered little or no monetary awards in the future.

The Sixth Circuit's denial of oral arguments and documentation (National Reporting System - NRS) which would support the Petitioner's and Objectors position deny them due process of law and enabled General Motors and the plaintiff's representative at the district court level to benefit. The representatives of the plaintiff at the lower level (district court) should have known and General Motors did know that OFCCP and General Motors had an agreement in effect

during the alleged period of discrimination that is and was similar to the monitoring system that is proposed in the Consent Decree. The representative of the Plaintiff at the district court level should have brought this to the attention of the district court Judge regarding the agreement between General Motors and OFCCP. In failing to do so, the plaintiff suffered and the representative of the plaintiff and General Motors benefited. The lower court also suffered because the Judge of said court thought that the monitoring system introduced and made part of the Consent Decree was innovative.

It is the contention of the Petitioner (Plaintiffs/Appellants) that the oral argument and documents presented at the appellate level should have been allowed in order to give the Objectors a fair and equitable hearing.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit and, at a minimum, this case should be remanded for trial on its merits unless the parties can submit or reach a Consent Decree which is free from the deficiencies alleged by the Objector (Plaintiffs/Appellants).

Respectfully Submitted,

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ATTORNEY FOR THE PETITIONER

APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

LARRY DODSON, et. al.,

Petitioners,

-v-

GENERAL MOTORS CORPORATION, et. al.,

Respondents.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS HAZEN HUGULEY, et al.,

Plaintiffs,

v.

Civil Action No.
83-2864
Hon. John Feikens

GENERAL MOTORS CORPORATION,

Defendant.

OPINION APPROVING CONSENT DECREE
AND ORDER DENYING MOTION
FOR SUBSTITUTION OF COUNSEL

This case began with a class action complaint filed in 1983 by Laras Eason on behalf of himself and all similarly situated black salaried employees against General Motors Corporation (General Motors) pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. ˆU 2000(e), et seq. (Title VII), the Civil Rights Act of 1866, 42 U.S.C. ˆU 1981, and the Elliott-Larsen Civil Rights Act, M.C.L.A. ˆU 37.2101, et seq.

Several amendments to the class action complaint were filed, it was amended for the third and final time by present counsel in 1986.

The third amended complaint alleges that the past and then-current General Motors salaried employee appraisal systems discriminated on the basis of race in appraisal ratings and with respect

to promotions, demotions, layoffs, recalls, pay and transfers. The scope of the class was narrowed to black salaried employees in the state of Michigan, Ohio and Indiana.

Previous plaintiff class counsel were replaced by current counsel in April of 1985.[1]

A description of the plaintiff class is requisite. By order of October 16, 1986 a class was certified consisting of all black salaried employees of General Motors in Michigan, Indiana and Ohio who were subject, between October 8, 1982 and September 25. 1986, to the General Motors appraisal systems for salaried employees. Those individuals employed in the General Motors legal and personnel departments designated as members of the General Motors defense team were excluded from this class. In 1987 the class was further limited to exclude black bonus- eligible employees in Michigan, Ohio and Indiana.

Prior to the onset of settlement negotiations, defendant challenged the certification of the class and filed a petition for a writ of mandamus with the United States Court of Appeals for the Sixth Circuit. The petition for mandamus was not granted, but the Court of Appeals ordered an evidentiary hearing. That order was vacated when the Court of Appeals realized that it had not received the brief of plaintiff class before taking action. As a part of wide-ranging settlement negotiations, the composition of the class was agreed to and, by letter of May 19, 1989, the parties requested the Court of

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[1]Previous counsel were discharged by class representatives. Fee problems developed and a hearing and opinion followed. See Huguley, et al. v. General Motors Corporation, No. 84-3865 (E.D. Mich. May 26, 1989).

Appeals to hold the mandamus petition in abeyance pending approval of the consent decree then being fashioned by the parties.

To return to the chronology of the case, the parties then engaged in extensive discovery. Personnel files of 500 randomly selected white and black salaried employees were furnished to the plaintiff class and, thereafter, computer tapes containing personnel information on all past and present General Motors employees who worked in the tri-state area from 1982-1986 were provided.

Extensive discovery, by way of depositions of General Motors officials, concerning the operations of the salaried employee appraisal systems, the training provided to supervisory personnel in connection with these systems, and the analysis performed of the results of the systems was also undertaken by the plaintiff class.

In 1988, settlement negotiations were renewed and carried on continuously from July through late October. Negotiations focused on discretionary salary increases and promotions, the two principal employment practices that plaintiff class alleged were statistically linked to the employee appraisal system. It is this appraisal system which is criticized as being discriminatory on a racial basis as it applies to black salaried employees of General Motors in Michigan, Ohio and Indiana.

A settlement agreement was reached in principle on October 21, 1988. A detailed proposed consent decree (decree) was submitted to the court on January 29, 1989.

In accordance with Rule 23 of the Federal Rules of Civil Procedure, see Williams, et al. v. Vukovich, et al., 720 F.2d 909 (6th Cir. 1983), this court preliminarily approved the proposed consent decree by order of February 3, 1989. Notice was given to all members

of the class that objections to the proposed consent decree were required to be filed by March 31, 1989. On April 7, 1989 an additional order was entered extending the time for filing of objections through April 30, 1989, and a hearing on objections was noticed for and held on June 26-27, 1989.

The consent decree resolves all claims of race discrimination asserted in, or in any way placed in issue by, the third amended complaint. This includes all claims related to any alleged racially discriminatory purpose, adverse impact or effect of the General Motors appraisal system for black salaried employees in the tri-state area or in any way related to race discrimination in promotions, pay, demotion, transfer, layoff, recall or other personnel decisions, including alleged retaliation for participation in this suit and from any claim for attorney fees and costs.

Prospective Relief

Central to the dispute between the parties is the General Motors salaried employee appraisal system. General Motors, on an annual basis, appraises the performance of its salaried employees. There are three steps utilized in the appraisal cycle: performance planning, on-going performance review, and completion by the employee of the appraisal worksheet. An appraising supervisor completes the performance appraisal review, and a discussion with the involved employee results in the final step in the appraisal cycle.

The heart of the settlement is contained in the establishment of a system for monitoring discretionary salary increases and promotions for each of the five reporting periods of the decree for all then-employed, non-bonus eligible black salaried employees in the tri-state area. The complaint of race discrimination in the appraisal

system is met and resolved through this adjustment system of monitoring discretionary salary increases and promotions. The appraisal system itself is left relatively untouched.

While there appears to be no precedent approving the type of computerized monitoring system established by the consent decree, the system adjusts for imbalances that may occur in the five-year period by providing that as of the monitoring date for each reporting period (a calendar quarter in the five-year term of the decree), the percentage of discretionary salary increases for black salaried employees in the tri-state area and the percentage of discretionary salary increases for all other salaried employees in the tri-state area will be calculated for each salary level.

For any level at which the difference in the percentage of discretionary salary increases for black salaried employees when compared to the percentage for non-black salaried employees exceeds 2 standard deviations, adjustments to the salaries of black salaried employees on that level, for that year, will be made to achieve a difference of no more than 1 standard deviation.

The consent decree states how adjustments will be administered in accordance with the salary administration plan in effect for the year in which the differential occurs.

Promotions likewise are monitored for each level by comparing the percentage of actual black promotions by level in the tri- state area to the percentage of expected black promotions generated by a computer model. If these promotion goals are not satisfied, then certain catch-up goals will be established.

The decree provides the methodology for monitoring these promotions as well as a procedure for adjustments. Important to the

monitoring system is a provision that if, for any two consecutive reporting periods, the tri-state figures show that the percentage of actual black promotions in a given level differs from the expected percentage of black promotions by more than 1.5 standard deviations, but less than 2 standard deviations, the underlying data for that level for the two periods will be aggregated. If the aggregated data reveal a difference between the percentage of actual and expected black promotions of more than 2 standard deviations, but less than 3 standard deviations, then the number of promotions of blacks required to bring the shortfall within 1.5 standard deviation will be the catch-up number for the next period.

If the aggregated data reveal a difference between the percentage of actual and expected black promotions of more than 3 standard deviations, then the catch-up goal for the next reporting period will be the number of promotions required to bring the difference within 2 standard deviations.

The decree provides for a detailed, written, annual report to plaintiffs' counsel concerning the group monitoring system and methods by which the report can be reviewed and challenged.

With regard to the commitment of General Motors to attain the promotion goals and/or catch-up promotions, insofar as that commitment is subject to the availability of qualified and interested black candidates for promotion, General Motors may assert a good faith explanation.

The decree contains a detailed method for individual monitoring so as to provide a procedure for any employee who disagrees with his or her grouping/ranking.

Finally there are miscellaneous provisions with regard to

notice, modification, confidentiality, restrictions on future activities of attorneys and experts for the plaintiff class. and provisions regarding construction and enforcement of the decree.

It provides that it shall be effective and binding for a five-year period from the time the decree has been finally affirmed.

Monetary Relief

The consent decree also provides monetary relief to certain ex employee class members, including ex-employees involuntarily terminated, a one-time salary adjustment for certain incumbent employee class members, for named plaintiffs, for anecdotal witnesses, for former anecdotal witnesses and for potential anecdotal witnesses, and for attorney fees and costs. The details of the decree providing monetary relief are discussed below in that portion of the opinion dealing with objections.

Objections to the Proposed Consent Decree

Plaintiff class consists of nearly 10,000 black salaried employees in Michigan, Ohio and Indiana. Approximately 15% of the plaintiff class filed objections. Many of these objections were identical in form, many employees objected to the decree's requirement of a general release by those employees receiving money benefits and that the monetary relief for the employee class was neither equitable nor adequate. Another group, again in identical form, objected to the fact that General Motors did not admit to unlawful conduct, that employees involuntarily released could not receive an award, that all incumbent employee class members should be given some monetary compensation, and that the proposed monitoring system is vague. They also claimed that the consent decree would stifle individual claims for relief. Other objectors claimed that the good faith defense

permitting General Motors to explain a failure to meet the group monitoring system goals was too vague.

An analysis of the objections indicates that the overwhelming number of complaints claim that monetary relief is insufficient. While the relief provided in the group monitoring system provides major relief to the class, the objectors focus primarily on the lack of adequate compensation for alleged past discrimination.

In the hearing on objections, the objectors, by consent.[2] were represented by Godfrey J. Dillard, and leeway was given to him and the objectors to amplify objections filed with the court. This was helpful in that it furthered an understanding of the general written objections, which in many instances were stated in broad form and not precisely described.

As indicated, the heart of this consent decree is the group monitoring system. It provides significant affirmative action relief. The monetary relief is secondary, and any consideration of monetary relief must be balanced with the massive potential relief provided in the group monitoring system.

The court approves the group monitoring system provided for in the decree. General Motors recognizes that plaintiff class claims an imbalance in promotion and salary adjustments because of alleged racial discrimination. This innovative monitoring system addresses that concern. The court notes that this procedure nonetheless also provides for promotion and salary adjustment based upon individual

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[2]Diverse clusters of objectors were either represented by other counsel or by themselves. At the hearing there was general agreement that they would be represented by lead counsel, Godfrey Dillard.

qualifications.

Of nearly 10,000 class members, approximately 2,800 are ex-employees who will share in a pool of $1-1.6 million, depending on the number of claims filed. One written objection stated that ex-employees who had been involuntarily terminated could not share in this pool. That objection has been removed by allowing their participation. Fourteen percent of the incumbent employee class whose salaries are furthest below statistical white salaried employees will receive first-year base salary adjustments ranging between $800-1,200. This equals a first-year distribution of base salary increases of $1 million to approximately 1,000 incumbent employee class members. The court approves of these significant distributions.

In considering the award to incumbent employees, the court notes that the incumbent employees receive a substantial benefit from future affirmative relief, which is the pre-eminent goal of this consent decree.

Regarding ex-employees, their recovery, of course, can only be monetary. Objection was raised that the ex-employee award pool should be fixed and not based upon the number of claim forms received. The consent decree provides that the award pool increases and decreases proportionately to the number of claims received. The court agrees that the amount of money an individual receives as an ex-employee should not depend on the number of claims filed.

The consent decree provides also that an additional group of eighty-eight named potential and anecdotal witnesses and named plaintiffs will receive a one-time distribution of approximately $322,496. As to these named plaintiffs and witnesses receiving significant awards, the court notes there have been no objections

criticizing these awards as too large. Objections, rather, have been made that the awards are too small. Named plaintiffs and witnesses are entitled to more consideration than class members generally because of the onerous burden of litigation that they have borne. I find this to be entirely fair.

Objection was made that class members are unprotected if General Motors continues the practices complained of in the case. However, the relief for individual claimants only releases General Motors for the practices complained of up to the date of approval of the consent decree.

Objection was made also that the consent decree fails to provide for an "opt-out" of individuals who desire not to be bound by the provisions of the consent decree. The court certified this class in accordance with the provision of Federal Rules of Civil Procedure 23(b)(2) (FRCP 23(b)(2)). This case reflects a typical FRCP 23(b)(2) class action settlement. Plaintiff class sought correction through affirmative action in the group monitoring plan for an imbalance[3] allegedly caused by reason of discrimination in promotions and salary adjustments. By their negotiations and settlement the parties have agreed that the prerequisites for the certification and maintenance of the class action are clearly satisfied. Common questions of law and fact substantially predominate, and the claims of the named plaintiffs are typical of the claims of the class. The named plaintiffs do fairly

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[3]The possibility of imbalance is tacitly recognized by General Motors. See Affidavit of Joan G. Haworth (attached as Ex. 4 to Memorandum of Defendant General Motors Corporation In Support of Approval of the Consent Decree (filed June 28, 1989)).

and adequately protect the interests of the class, and their current counsel are skilled in the handling of employee discrimination cases. The requirements for certification under FRCP 23(b)(2) are satisfied.

Further opportunity was afforded at hearing to those individuals who had any claims against General Motors which were the subject of the third amended complaint: they were permitted to present reasons why their cases should not be precluded by approval of the decree. Other than general statements indicating that an opt-out clause should be contained in the consent decree, this was not urged by objectors at the hearing. Objection was made that class members were not protected against retaliation by General Motors for participation in this case. It is clear that the consent decree specifically states that a class member has a right to be protected against such retaliation.

The consent decree likewise protects class members against the release of claims challenging future actions on the part of General Motors.

The nondisclosure provisions also are reasonable. These provisions protect sensitive personnel information because of privacy concerns.

Objection was made that an ex-employee award should not be contingent upon filing a proper claim form. This objection is without merit. The claim form itself is a simple one requiring answers to six questions.

The monitoring system provided for in the consent decree was criticized by the objectors. It is significant that criticisms of the monitoring system were largely conclusory. The court finds that the group monitoring system devised in this consent decree is innovative.

The system requires that discretionary salary increases and promotions to black employees shall not deviate more than 2 standard deviations from those of comparably qualified white employees at each pay level of each year for a five-year monitoring period. Essentially the design is that a computer will generate a white employee model of success with respect to discretionary pay increases and promotions and then apply that model to the comparable black employee population to reach an expected number of pay increases and promotions.

Certain objectors pointed out that the monitoring should be on a facility-by-facility basis rather than on a company-wide basis at each employment level. It appears to the court that a company-wide population for each level would more clearly permit discriminatory patterns to emerge.

The objection that the five-year monitoring period is too short is without merit.

The claim is made that 2 standard deviations allow too much leeway in the monitoring plan. It is clear that 2 standard deviations are a widely accepted statistical range applied when considering whether employers have engaged in discrimination. Hazelwood School District v. U.S., 433 U.S. 299 (1977); Castaneda, Sheriff v. Partida, 430 U.S. 482 (1976).

Both at the objectors' hearing and in a second hearing held on August 11, 1989, in which some of the objectors sought to have current counsel for the plaintiff class removed, it was alleged that plaintiffs' representation is inadequate because, of the named plaintiffs, only Larry Dodson remains a current employee of General Motors. Persons who are employees of a company at the start of a

class action, but who are no longer employees when a consent decree is sought to be approved, do not by reason of their ex-employee status become inadequate class representatives. See Senter v. General Motors, S32 F.2d 511 (6th Cir. 1976), cert. denied 429 U.S. 870 (1976).

In any event, at the hearing, plaintiff class indicated that they would have two current General Motors employees, Darnita Stein of Michigan and Robert Raglin of Ohio, added as named; plaintiffs. General Motors has indicated that it will not object to the addition of these persons as named plaintiffs.

Finally, an objection is made that there is insufficient employee representation on the individual monitoring panels. The independent review panel is to be comprised of five employees -- two appointed by General Motors, two by the employees from a list provided by management outside of the employees' chain of command, and one by the employee. This appears to be a fair arrangement and provides for review in an acceptable manner. As counsel for the plaintiff class have pointed out, it would be remarkable if management surrendered this decisional process to complete employee control.

Attorney Fees and Costs

The consent decree provides that plaintiff counsel shall be paid $457.000 in attorney fees. This covers the period from the onset of plaintiff counsel's activity in the case (April 1985) up to October 21, 1988. For work performed by plaintiffs' counsel after that date, General Motors will pay such fees as the parties may agree at the hourly rates set forth in the consent decree. As to costs, plaintiffs' counsel represented in the Brief In Support Of Plaintiffs' Answer To Plaintiff-Objector's Motion For Substitution of Attorney, filed August

8, 1989, that the firm of Lopatin, Miller, Freedman, Bluestone, Erlich, Rosen & Bartnick (Lopatin, Miller) has advanced over $200.000 in expenses. Plaintiff class reimbursed Lopatin, Miller for $20.000 of this $200.000.

Attorney fees and costs were negotiated by the parties. The court is satisfied that, through the adversary process involved in the negotiation and settlement of this substantial class action, the nature and extent of the legal services provided by plaintiff counsel and the costs expended were carefully considered.

No written objections were filed regarding the amount of fees allotted by the consent decree to plaintiff counsel. This opinion will later discuss a motion filed by objectors for the substitution of objectors' counsel, Godfrey J. Dillard, for Lopatin, Miller. Even though objectors challenged the representation of Lopatin, Miller, no objection was made to the amount of fees to be paid.

Accordingly, the consent decree's provision for the payment of attorney fees and costs is approved.

Conclusion

The court summarizes its findings as follows:

Terms of the consent decree are fair, reasonable, adequate and consistent with the public interest in settling disputes. ("The settlement is consistent with the public interest. '[T]here is an overriding public interest in settling and quieting litigation.'" Van Bronkhorst, et al. v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976). "Voluntary out-of-court settlement of disputes is highly favored in the law." In re "Agent Orange" Product Liability Litigation, 597 F.Supp. 740, 758-59 (E.D.N.Y. 1984), affirmed 818 F.2d 145 (2d Cir. 1987), cert. denied 108 S.Ct. 695 (1988)).

The preferential treatment of the named plaintiffs is fair. Franks v. Kroqer Co., 649 F.2d 1216, 1225-26 (6th Cir. 1981).

The court must also evaluate the adequacy of the decree "by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement. Williams, supra at 922, citing Carson, et al. v. American Brands, Inc. 450 U.S. at 88, n.14 (1981).

Counsel for both plaintiff class and defendant have called attention to the recent decisions of the United States Supreme Court which may impact this litigation if the proposed consent decree is not approved.

While the court should not determine the merits of the controversy or the precise facts underlying the legal position of the litigants presenting the consent decree, the court must evaluate the adequacy of the consent decree "by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement." Carson. supra at 88. It might well be that if this consent decree is not approved, plaintiff class might not be able to establish liability or, alternatively, the relief available might be less than that provided in the proposed consent decree. See Wards Cove Packing Company, Inc., et al. v. Frank Antonio, et al., 57 U.S.L.W. 4583 (June 5, 1989).

The court is satisfied that the resiudicata effects of the settlement on all members of plaintiff class are fair.

Post-Fairness Hearing Developments

When the fairness hearing concluded, the court suggested to counsel for the parties and the objectors that they should engage in further discussion to decide whether the claims of the objectors could

be resolved. These discussions were fruitless and the court was asked to proceed to decision.

On August 3, 1989, named plaintiff Larry Dodson and other objectors to the consent decree, through their counsel Godfrey J. Dillard, moved the court to substitute Dillard for the firm of Lopatin, Miller, Freedman, Bluestone, Erlich, Rosen & Bartnick as plaintiff class counsel. A hearing was held on this motion on August 11, 1989.

Dillard made conclusory allegations concerning the inadequacy of Lopatin, Miller as representatives of plaintiffs' class. Principal objections were that counsel is out of touch with members of the class; that there had been no contact with class members in the previous thirty days: that, according to the Affidavit of named class representative Larry Dodson, "National Vice- President of the Pro-Minority Action Coalition, ... and a principal player in the decision to institute and prosecute the; within action, ... the continued legal representation by the Firm of Lopatin, Miller, et al. is not in the best interest of the class"; that "the present attorneys are in collusion with Defendant's attorneys": and that "the present attorneys have had little or no contact with class members". Affidavit of Larry Dodson, filed August 17, 1989.

Objectors' counsel Dillard requested that an evidentiary hearing be held. To determine the likely content of such an evidentiary hearing, the court requested an offer of proof. In response thereto, Dillard stated that he would prove that in the last thirty days there had been no contact between Lopatin, Miller and objectors; that there are class members who have attempted to raise issues regarding individual cases. However, in response to the court's question, Dillard could offer no witness names. He stated that he believed these people

had attempted to communicate with Lopatin, Miller either by telephone or by writing "several letters." Transcript of August 11, 1989 Evidentiary Hearing at pp. 43-45.

He also stated that his proofs would show that "during the course of the discussions that we had over the few days after the consent decree [alluding to the fairness hearing] ... I was told specifically by Mr. [Dennis] James that there was going to be a settlement that was going to be cut between him and the defendants to the exclusion of me ...." Tr. at 45.

The analysis of the United States Court of Appeals for the Second Circuit in City of Detroit v. Grinnell Corp., 495 F.2d 448, 449, 464 (2d Cir. 1974), quoted with approval in Geier v. Alexander, 801 F.2d 799, 809 (6th Cir. 1986), applies to Dillard's objections:

> In general the position taken by the objectors is that by merely objecting. they are entitled to stop the settlement in its tracks, without demonstrating any factual basis for their objections and to force the parties to expend large amounts of time, money and effort to answer their rhetorical questions, notwithstanding the copious discovery available from years of prior litigation and extensive pre-trial proceedings. To allow the objectors to disrupt the settlement on the basis of nothing more than their unsupported suppositions would completely thwart the settlement process. On their theory no class action would ever be settled, so long as there was at least a single lawyer around who would like to replace counsel for the class and start the case anew. To permit the objectors to manipulate the distribution of the burden of proof to achieve such an end would be to permit too much. Although the parties reaching the settlement have the obligation to support their conclusion to the satisfaction of the District Court, once they have done go, they are not under any recurring obligation to take up their burden again and again ad infinitum unless

> the objectors have made a clear and specific showing that vital material was ignored by the District Court. There is no need for the District Court to hold an additional evidentiary hearing on the propriety of the settlement. Its conclusion appears to have been reached only after a thorough investigation of all relevant facts.

Id.

This statement describes clearly what the objectors and their counsel are attempting to do. Most pertinent is this comment in City of Detroit, supra: "On their theory no class action would ever be settled, so long as there was at least a single lawyer around who would like to replace counsel for the class and start the case anew." Or, again: "[When] the parties reaching the settlement have [met their obligation to support their conclusions to the satisfaction of the district court], once they have done so, they are not under any recurring obligation to take up their burden again and again ad infinitum unless the objectors have made a clear and specific showing that vital material was ignored by the District Court. There is no need for the District Court to hold an additional evidentiary hearing on the propriety of the settlement." Id. at 464.

Accordingly, the motion by named plaintiff Larry Dodson and other objectors for substitution of counsel is DENIED.

An order approving the consent decree may be submitted.

IT IS SO ORDERED.

John Feikens
United States District Judge

Dated: Sept. 1, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS HAZEN HUGULEY,
LARRY KITCHEN, JAMES KENNEDY,
AND LARRY DODSON, for themselves
and all others similarly involved,

Plaintiffs,

-v-

Civil Action
No. 83 CV 2864 DT

GENERAL MOTORS CORPORATION,
a foreign corporation,

Honorable John Feikens

Defendant.
_____/

ORDER APPROVING CONSENT DECREE

At a session of said Court held in the United States Courthouse, Federal Building, Detroit, Michigan on _____

PRESENT: HONORABLE John Feikens
U.S. DISTRICT COURT JUDGE

For the reasons set forth in the Court's Opinion Approving Consent Decree and Order Denying Motion for Substitution of Counsel of September 1, 1989, and in consideration of the entire record;

IT IS HEREBY ORDERED that the proposed Consent Decree submitted to the Court on January 26, 1989 as amended July 31, 1989 is approved.

John Feikens
U.S. DISTRICT COURT JUDGE

APPROVED AS TO FORM:

DENNIS D. JAMES (P15427)
Attorney for Plaintiffs

BARBARA BERISH BROWN
Attorney for Defendant

MARK FLORA (P24832)
Attorney for Defendant

NO. 89 2172

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DENNIS HAZEN HUGULEY, et al.,
(Class Action)

Plaintiffs-Appellees,

LARRY DODSON, et al.,
(Objectors-Class Action)

Plaintiffs-Appellants,

v.

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

_____/

Before: GUY and BOGGS, Circuit Judges; and EDWARDS, Senior Circuit Judge.

PER CURIAM. Plaintiffs (objectors) appeal from the district court's approval of a consent decree resolving a suit filed pursuant to Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. S 2000e, et seq., 42 U.S.C. S 1981, and the Elliott- Larsen Civil Rights Act, Mich. Comp. Laws Ann. ˆU 37.2101, et˜. The suit was brought on behalf of black salaried employees of General Motors. The employee class claimed that General Motors' performance appraisal system discriminated against them.

The objectors make the following arguments: (1) the class of objectors has standing on appeal; (2) the trial court abused its

discretion when it failed to allow members of the class to opt out, after certifying this as a class action pursuant to FED. R. CN. P. 23(b)(2); and (3) the trial court abused its discretion when it approved the consent decree over the objections of 15 percent of the plaintiff class, because both the compensation afforded and the monitoring system provided by the consent decree were inadequate. We find the objectors' arguments without merit and, accordingly, affirm.

I. FACTS

The original complaint was filed in 1983 by Laras Eason on behalf of himself and all similarly situated black salaried General Motors employees. Several amendments to the original complaint were filed. The third amended complaint was filed in 1986 and alleged that General Motors' performance appraisal system was discriminatory with respect to promotions, demotions, layoffs, recalls, salary increases, and transfers.

The district court certified the class pursuant to FED. R. CIV. P. 23(b)(2) on October 16, 1986, over General Motors' objections.[1]

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[1]The class was further limited to employees in the states of Michigan, Ohio, and Indiana who were subject to General Motors' performance appraisal system between October 8, 1982, and September 25, 1986. Employees in the legal and personnel departments were excluded. In total, the class consisted of nearly 10,000 current and former employees.

General Motors filed a petition for a writ of mandamus with the circuit challenging the district court's certification of the plaintiff class. Although the petition for mandamus was not granted, the court of appeals ordered an evidentiary hearing. The parties subsequently agreed, as part of their settlement negotiations, to the certified class and petitioned the court of appeals to hold the mandamus petition in abeyance pending approval of a consent decree between the parties.

After extensive discovery and lengthy settlement negotiations, the parties proposed a consent decree to the court on January 29, 1989.[2] The district court preliminarily approved the consent decree on February 3, 1989. The consent decree provides the following: (1) a computerized system will monitor the performance appraisal system and notify General Motors when the employment statistics relating to black employees vary significantly from those of white employees; (2) General Motors, when informed of statistically significant deviations, will make necessary adjustments to offset any discrepancies; (3) monetary relief, which will be provided in the form of one-time payments to former employees who are members of the class, for named plaintiffs and anecdotal witnesses, and attorneys' fees. Permanent salary adjustments for current employees as well as attorneys' fees were also included in the proposed consent decree.

Notice was given to all members of the class that objections to the proposed consent decree were required to be filed by March 31, 1989; this time was subsequently extended through April 7, 1989. A fairness hearing was held on June 26 and 27, 1989. All members of the class were given notice of the hearing.

At the fairness hearing, objectors to the consent decree were given the opportunity to present their arguments as to why the

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[2]Discovery included the following: 1) furnishing 500 randomly selected personnel files of both white and black salaried employees; 2) providing computer tapes containing personnel information on all past and present General Motors employees who worked in the certified geographic area during 1982-1986; and 3) numerous depositions of General Motors officials concerning the operations of the performance appraisal system and training associated with the use of the system.

consent decree should not be approved by the court. The objections presented to the court encompassed the issues raised on appeal and several additional issues. These additional issues included, among sundry minor other issues, allowing the pool for monetary recovery for former employees to be dependent on the number of employees making claims, which the district court agreed was inappropriate, and releasing claims for discrimination by General Motors in the future, which the district conclusion was not part of the decree.

After the fairness hearing, the court gave its final approval to the consent decree because it found the terms to be fair, reasonable, and adequate. While approving the consent decree, the court also denied a motion for substitution of counsel for the plaintiff dass. The motion for substitution d counsel was supposed by those members of the class who were dissatisfied with the settlement. This appeal followed.

II. STANDING

Although defendant argues that the objectors lack standing to appeal the terms of the consent decree, we choose nonetheless to address the merits of the issues raised by the objectors. In light of the fact that we find the objectors' claims wholly without merit, our assumption in favor of standing for the objectors is without consequence and should not be construed as a decision on the merits on the standing issue.

III. INABILITY TO OPT OUT

The objectors argue that they should have been permitted to opt out of the class. There is no absolute right to opt out of FED. R. CN. P. 23(b)(2) class actions, however. Laskey v. United Automobile Workers. 638 F.2d 954, 956 (6th. Cir. 1981); see King v. South Cent.

Bell Tel. & Tel.. 790 F.2d 524, 530 (6th Cir. 1986) (plaintiff "could not opt out because the action did not include that privilege"); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1775 (1986) ("ability of a class member to exclude himself from the judgment will depend on which subdivision [(b)(2) or (b)(3)] is deemed controlling').[3] Even if we were to accept the objectors' argument that we should adopt an abuse of discretion standard as announced in Holmes v. Continental Can Co., 706 F.2d 1144, 1155 (11th Cir. 1983), the trial court in the current case did not abuse its discretion when it failed to provide class members with the ability to opt out.

The policy in favor of not allowing class members to opt out of 23(b)(2) class actions stems from concern that "defendants would not be inclined to settle where the result would likely be a settlement applicable only to class members with questionable claims, with those having stronger claims opting out to pursue their individual claims separately." Kincaide v. General Tire & Rubber Co., 635 F.2d 501, 507 (5th Cir. 1981). Thus, "[l]awsuits alleging class-wide discrimination are particularly well suited for 23(b)(2) treatment since the common claim is susceptible to a single proof and subject to a single injunctive remedy." Senter v. General Motors Corp., 532 F.2d 511, 525 (6th Cir.), cert. denied, 429 U.S. 870 (1976). Additionally, we have said that "[i]n the interests of judicial economy and emciency," i.e., to avoid needless duplicative suits, courts should generally certify classes pursuant to 23(b)(2) when the class members are seeking injunctive relief and, correspondingly, not allow class

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[3]See also Mitchell v. Dutton, No. 87-5574, slip op. at 10-11 (6th Cir. Jan. 3, 1989).

members to opt out. Laskey, 638 F.2d at 956.

Although the consent decree before us awards some monetary relief in the form of back pay and compensation hr time spent in the litigation process, the crux of the settlement involves equitable relief in the form of a monitoring system for the defendant's performance appraisal system. The class members' complaint centered on the discriminatory effects of General Motors' performance appraisal system. The remedy, i.e., General Motors' commitment to respond to any statistically significant differences highlighted by the computer monitoring system, necessarily is a remedy for all employees who were subject to evaluations based on the performance appraisal system. In light of the systemic nature of the problem and the magnitude of the remedy, the incentive for the defendant to enter into a consent decree would have been non- existent if class members had been allowed to opt out of the class. In fact, this is a case where to permit opting out may even have been an abuse of discretion due to the nature of the complaint.

IV. FAIRNESS OF CONSENT DECREE

The objectors also argue that the trial court abused its discretion when it approved the consent decree and held that it was "fair, reasonable, adequate, and consistent with the public interest in settling disputes." (App. at 614).[4]

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[4]Plaintiffs cannot voluntarily decline to pursue a class action once it has been filed. Fed. R. Civ. P. 23(e) specifies:

> (e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be

They argue essentially that the decree Should not have been approved in light of the number of objectors, the disproportionate award to named plaintiffs and anecdotal witnesses, the inadequate awards for back pay and salary adjustments, and the ineffectiveness of the computer monitoring system to change the source of discriminatory practices at General Motors.

It is well established that "[t]he ultimate issue the court must decide at the conclusion of the [fairness] hearing is whether the decree is fair, adequate, and reasonable. The Court has no occasion to determine the merits of the controversy or the factual underpinning of the legal authorities advanced by the parties." Williams v. Vukovich, 720 F.2d 909, 921 (6th Cir. 1983) (citation omitted). The factors a court must consider before approving a consent decree include "the fairness of the decree to those affected, the adequacy of the settlement to the class, and the public interest." Id. With these factors in mind, we will examine the plaintiffs' arguments.

The objectors argue that, because so many members are dissatisfied with the consent decree, the consent decree's unfairness is apparent. Notably, only 15 percent, or 1,500 members, of the class have any objections to the settlement. Assuming the objectors are properly representing the actual number of dissatisfied class members, an assumption that the other class members and defendant adamantly contest, a 15 percent rate of dissatisfaction, standing alone, would not suggest that the court abused its discretion in approving the settlement. See. e.g., Grant v. Bethlehem Steel Corp., 823 F.2d 20 (2d

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given to all members of the class in such manner as the court directs.

Cir. 1987) (settlement approved over objections of 36 percent of class); Reed v. General Motors Core., 703 F.2d 170 (5th Cir. 1983) (settlement approved over objections of 40 percent of class).

The objectors take issue with the one-time distribution of $322,496 to the 88 named plaintiffs and anecdotal witnesses. This award was meant to compensate them for their efforts expended throughout the litigation. This issue is not properly raised on appeal. The district court noted that "there have been no objections criticizing these awards as too large. Objections, rather, have been made that the awards are too small. (App. at 608).

Objectors also assert that the awards for back pay and salary increases are inadequate. The district court enumerated these awards as follows:

> Of nearly 10,000 class members, approximately 2,800 are ex-employees who will share in a pool of $1-1.6 million, depending on the number of claims filed.... Fourteen percent of the incumbent employee class whose salaries are furthest below statistical white salaried employees will receive first-year base salary adjustments ranging between $800-1,200. This equals a first-year distribution of base salary increases of $1 million to approximately 1,000 incumbent employee class members....

(App. at 607). The district court concluded that the thrust of affirmative relief for current employees is the computer monitoring system and the changes in the disparate treatment of black salaried employees that it will promote. We agree.

Finally, we find objectors' argument that the monitoring system fails to ameliorate the cause of discrimination equally without merit. The entire purpose of the monitoring system is to draw General

Motors' attention to areas in which there is a disparity in the treatment of blacks as compared to whites. The plaintiff class' complaint alleged that there were disparities along racial lines in General Motors' performance appraisal system as they related to promotions, demotions, layoffs, etc. The monitoring system addresses precisely these concerns.

AFFIRMED.

Attest:
LEONARD GREEN, Clerk

By Sue Johnson
Deputy Clerk

NATIONAL

REPORTING SYSTEM

for

GENERAL MOTORS CORPORATION

MEMORANDUM OF AGREEMENT

THIS AGREEMENT. made and entered into this 15th day of January, 1985, modifies a previous Agreement dated the 30th day of November 1983, [See Attachment A] between the General Motors Corporation (the "Corporation"), and the Office of Federal Contract Compliance Programs of the Employment Standards Administration in the United States Department of Labor (the "OFCCP"). The Corporation's subsidiaries and joint ventures are not included in this Agreement.

I. BACKGROUND AND PURPOSE OF THE AGREEMENT

The Corporation, subject to Executive Order 11246, represents that to the best of its knowledge it is in compliance with the Executive Order and implementing regulations. The Corporation also has entered into a 1983 Conciliation Agreement with the Equal Employment Opportunity Commission whereby the Corporation has agreed to engage in significant outreach and training programs to help women and minorities in the organization as well as externally. The Corporation represents that it currently has in place affirmative action programs, including internal monitoring procedures, which are in conformance with the requirements of the Executive Order and its implementing regulations and based on a national affirmative action program methodology, Nothing contained in this Agreement is intended to relieve the Corporation of the obligations imposed on it by the Executive Order and its implementing regulations.

OFCCP recognizes that it does not have the resources to do compliance reviews at all government contractors' facilities in a given year. There are over 78,000 facilities, covering in excess of 23 million employees, subject to the written Affirmative Action Program

requirements of the Executive Order.

The National Reporting System ("NRS") will allow OFCCP to have an opportunity to review the overall progress of the Corporation on a nationwide basis by job groups. The parties agree that this approach will enhance the Corporation s ability to aggressively pursue affirmative action to achieve equal employment opportunity. The parties also recognize that during any one year it would be impossible for OFCCP to do compliance reviews of a significant percentage of the Corporation's over 500 facilities and 500,000 employees.

In order to achieve a more effective and more efficient equal employment opportunity program, thereby enhancing equal employment opportunity for qualified minority and female candidates, the parties agree that it is in their best interest for the Corporation to continue an NRS which informs OFCCP of the Corporation's affirmative action progress in relation to the employment and upgrading of minorities and women.

The parties also are establishing a methodology for resolving differences or disagreements, which provides for the selection of establishments for standard compliance reviews.

Nothing in this Agreement limits the right or obligation of OFCCP to enforce the Executive Order requirements against the Corporation's facilities, to complete any compliance reviews under way or noticed as of the date of signing this Agreement, to conduct complaint investigations at any of the facilities or to conduct pre-award reviews insofar as OFCCP is required by law to conduct such reviews.

Further, it is understood and agreed that nothing in this Agreement limits the rights or duties of OFCCP to enforce 38 U.S.C.

2012 and/or 29 U.S.C. 793.

II. THE NATIONAL REPORTING SYSTEM

A. Outline of the system

This Agreement modifies an earlier understanding reached by the parties and dated November 30, 1983. The NRS will provide accurate information regarding the Corporation's employment and upgrading of minorities and women and will identify where corrective action may be necessary. The NRS reports. submitted pursuant to this modified agreement, shall show employment data as described in Section B below, as of t~.e end of each calendar year, beginning with calendar year 1985 and concluding with the report submitted for calendar year 1988 on March 15, 1989. The reports as described below will be submitted to the National Office of OFCCP for calendar years. 1985, 1986. 1987, and 1988 no later than March 15 of each succeeding year. In addition. a half-year report, covering the period January 1 through June 30, 1985, will be provided no later than August 1, 1985. A March 15, 1985 Report for calendar year 1984 will be submitted pursuant to the November 30, 1983 agreement.

The NRS will reflect a profile of affirmative action performance under Executive Order 11246 utilizing consistent points of reference and consistent points of evaluation. The NRS will consist of four reporting levels. each report of an increasing level of specificity. The first report is mandatory and must be submitted by the specified reporting date. The remaining three reports will be submitted depending on the results of prior reports as outlined in Section B herein. Failure to provide a report on time may be cause for unilateral cancellation of this Agreement by OFCCP. The NRS is designed to be easily and quickly analyzed in a cost effective manner by the National

Office of OFCCP.

The Corporation or OFCCP may terminate this Agreement. if the nature of the affirmative action requirement is altered by regulatory change.

B. The NRS Report

Report 1 Will consist of the Corporate Job Group Summary, which will state the total number of incumbents in each corporate-wide job group by race and sex. and will identify corporate job groups where the utilization percentage of minorities or women is less than availability. The job groups developed for the Standardized Affirmative Action Format (SAAF) must be used in the NRS. The corporate-wide availability for each job group shall be an aggregated availability for that particular job group, (i.e.. each establishment's availability figures for each job group will be weighted based on the percentage of incumbents in such job group employed at that establishment). [See Attachment B]. The methodology each establishment uses for computing availability is standardized in the SAAF. Availability will be determined by analyzing internal (i.e., transfers and promotions) and external (i.e., new hires) movement into a job group. For the purpose of determining appropriate feeder pools, the internal and external movement will be weighted in accordance with both past experience and future anticipated placement decisions (e.g.. reorganization; technological change; transfer. change or elimination of function).

No further reporting shall be required for job groups where the utilization of minorities and/or women is within two standard deviations of availability or for clerical job groups where the utilization of women is 50 percent or-greater. This shall not be considered a

utilization analysis.

If the representation of minorities and/or women in a particular job group is not within two standard deviations of availability at the corporate-wide level, then Report 1 shall indicate the actual corporate-wide placement rates as compared to the corporate-wide availability for that job group. A placement is defined as a new hire, transfer or a promotion into the job group during the reporting period. Placement decisions over which the Corporation has no control (e.g., placements as a result of recall, returns from leaves of absence, or new employe placement resulting from mergers and acquisitions) will not be counted as placements.

If the corporate-wide placement rate of minorities and/or women for a given job group falls short of corporate- wide availability for that job group, then Report 2 must be prepared.

Report 2 shall consist of a further analysis by the Corporation's Executive Group [See Attachment C] level of those groups requiring additional reporting as determined by the above methodology. Each job group in Report 2 shall be analyzed by the same two-step procedure as required for Report 1 (i.e., representation analysis; placement analysis, if necessary). Availability for each job group at the Executive Group Level shall be the aggregated weighted averages of each plant or establishment within the specific Executive Group Level.

For job groups in the Executive Group level where incumbency is not within the two standard deviation level from availability and the placement rate is below availability, an additional Report 3 will be required. Report 3 shall consist of a further analysis at the Division level or staff [See Attachment C] of those groups requiring additional

reporting as determined by the above methodology. Report 3 shall be similar in form to Reports 1 and 2.

For job groups within a Division or staff that require additional reporting as determined above, Report 4 shall be prepared. Report 4 shall be similar in form to Reports 1, 2, and 3, and it shall analyze the job groups for each plant or establishment pursuant to the above methodology within that Division or staff.

For job groups at the Report 4 level that are (l) underutilized at the two standard deviation level and (2) have a placement rate less than availability, and (3) have a significant number of transactions within the reporting period (i.e., placements times availability produces one whole person), the Corporation shall meet with OFCCP and offer an explanation of the Corporation's good faith efforts to achieve its goals. and/or the personnel activity at that facility or establishment (e.g., layoffs, voluntary terminations, transfers. circumstances beyond the Corporation's control -- or other non-discriminatory reasons -- which may have prevented the Corporation from meeting its goals). If the explanation is not satisfactory to OFCCP, the Corporation and the OFCCP National Office will attempt in good faith to arrive at a corrective action program that will resolve the identified problem prior to an on site audit.

The selection of an additional facility for an on site review shall be made pursuant to the Equal Employment Data System of OFCCP. These reviews shall be initiated through a Notice of Desk Audit by November 15 of each year. OFCCP will continue to conduct Pre-Award audits pursuant to its present program.

If, after the proper notification, there are ten facilities available to OFCCP for the Pre-Award compliance review and pursuant to NRS reports then this optional review procedure will not be used.

III. COMMITMENTS OF THE PARTIES

1. The Corporation agrees to provide the National Office of OFCCP with the NRS reports as described herein by August 1, 1985, and by March 15, 1986, 1987, 1988 and 1989. Failure to do so in a timely manner may result in unilateral cancellation of this Agreement by OFCCP.

2. Disagreements between the Corporation and OFCCP will be dealt with by discussion and good faith negotiations.

3. OFCCP agrees that to the extent that it selects facilities for review pursuant to this Agreement, OFCCP in monitoring the Corporation's affirmative action obligations, will focus on those job groups that are underutilized and the adequacy of the Corporation's good faith effort.

4. All NRS reports will be considered in the custody of OFCCP and retained. At OFCCP's request, the corporation agrees to meet with OFCCP and verify or clarify, to OFCCP's satisfaction, any condition reported on the NRS. After timely good faith discussion. if the parties are unable to agree as to verification or clarification, either

party may unilaterally cancel the Agreement.

5. Individual charges of discrimination filed with OFCCP pursuant to the Executive Order by the Corporation's employees and applicants for employment, shall be referred to the EEOC consistent with OFCCP's Memorandum of Understanding with the EEOC.

Class or systemic charges filed pursuant to the Executive Order, and all charges filed pursuant to Section 503 of the Rehabilitation Act of 1973 and Section 2012 of the Vietnam Era Veterans' Readjustment Assistance Act, shall be investigated consistent with applicable regulations and procedures; provided, however. that the investigation of any Executive Order complaint shall be limited to the specific charge that was filed. In those instances where a class or systemic charge is non-specific or broadly based, OFCCP's investigation of such issue or issues will be limited to the personnel practices that allegedly arise from disparate treatment or have an adverse impact on minorities and/or women and for which the complainant(s) submit evidence for their allegations which OFCCP believes is sufficient to proceed with an investigation.

If a pattern and practice of disparate treatment by individual supervisors is alleged, or if it is alleged that a personnel practice or policy, neutral on its face, has an adverse impact in a given department because individual supervisors are alleged to be discriminating, then those individual supervisors or managers and their alleged discriminatory practices will be investigated by OFCCP. Investigations will be expanded beyond the department in which individual supervisors are alleged to be discriminating if evidence is uncovered in the investigation of that department that indicates the potential of discriminatory actions in other departments. In either

event, to the extent that there are policies of the Corporation alleged to be discriminatory, those investigations will be conducted by the National Office of OFCCP with assistance £rom its field organization where appropriate.

6. OFCCP agrees that it shall exercise its discretion regarding the NRS data and any subsequent data or material provided at the request of OFCCP, to assert all applicable exemptions under the Freedom of Information Act, 5 U.S.C. 552, or under any other authority in response to any request for such data or material during the life of this Agreement or any extension thereof. OFCCP agrees to provide written notice to the Corporation when data are the subject of a FOIA or any other request before responding thereto, and agrees, further, to provide ten working days written notice to the Corporation of any proposed release of data.

7. NRS, or other reports or data submitted pursuant to this Agreement by any of the Corporation's, facilities is to be used as a resource in making selection decisions and may not, without other evidence, be used to demonstrate a finding by OFCCP of a lack of compliance by any facility with Executive Order 11246 or its implementing regulations.

8. The Corporation's headquarters will be responsible for submitting the NRS reports described in this Agreement to the National Office of OFCCP.

9. After submitting the reports on March 15, 1988, the parties will jointly determine within the following 60 days whether to continue the NRS, modify it in any way or discontinue this Agreement on December 31, 1988. In any event, a report for calendar year 1988 shall be submitted no later than March 15, 1989. However, the

Agreement may be terminated by either party, with written notice, 30 days prior to the end of any calendar year; provided, however, that a report for the final calendar year shall be submitted no later than March 15 of the following year.

10. OFCCP agrees to designate one or more persons to be responsible for receiving and analyzing the NRS reports, and for all follow-up inquiries and discussions with the Corporation. The Corporation will designate a liaison to respond to and cooperate with OFCCP.

11. Either party may propose modification in any of the terms of this Agreement, including any change in reporting, however, the changes must be approved by both parties.

12. If business circumstances change, including but not limited to corporate restructuring, in ways that either party believes will impact the effectiveness, administration or operation of this Agreement, the parties will meet to discuss appropriate modifications to this Agreement as more fully described in Paragraph 11 above.

13. To the extent that a dispute arises based on differing interpretations of this Agreement and the SAAF, this Agreement will control.

14. OFCCP agrees not to share the data acquired pursuant to this Agreement with any governmental agency with which it does not have an agreement to share data.

This modified agreement represents the entire Agreement on the NRS Program between the parties. To the extent this Agreement varies from that dated November 30, 1983, this Agreement will control.

IN WITNESS WHEREOF, the parties hereto have caused this

Agreement to be executed by their respective representatives on the day and year first above written.

GENERAL MOTORS CORPORATION

Witness: _____

By: A. S. Warren, Jr.
Vice President In Charge
of Industrial Relations
Staff

By: Edmond J. Dilworth, Jr.
Assistant General Counsel

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS OF THE
UNITED STATES DEPARTMENT
OF LABOR

Witness: _____

By: Susan R. Meisinger
Deputy Under Secretary for
Employment Standards

ATTACHMENT B

Administrative Staff 6-8

Establishment	Total Incumbents	Minority Availability	Weighted Availability
Delco Products	500 (20%)	10%	2.0%
Electromotive	1,000 (40%)	5%	2.0%
Oldsmobile	750 (30%)	20%	6.0%
Saginaw steering Gear	250 (10%)	12%	1.2%
Corporate Total	2,500		11.2%

*/ Availability is determined at each facility based upon the Corporations' Standardized Affirmative Action Format.

In the above example, weighted availability for the job group at each facility is determined by multiplying facility incumbent percentages of the corporate job group total (column 1) by minority availability percentages (column 2) to arrive at the weighted availability (column 3). The sum of the weighted availabilities for the job group at each facility is the aggregated weighted availability.

ATTACHMENT C

CPC GROUP

Chevrolet
Pontiac

BOC GROUP

Buick
Oldsmobile
Cadillac

ELECTRICAL COMPONENTS GROUP

AC Sparkplug
Delco Electronics
Delco Products
Delco Remy
Packard Electric
Rochester Products

MECHANICAL COMPONENTS GROUP

Fisher Guide
Central Foundry
Delco Marine
Harrison Radiator
Hydra-Matic
Inland
New Departure Hyatt
Saginaw Steering Gear

TRUCK AND BUS GROUP

Truck and Bus Operations
Detroit Diesel Allison

POWER PRODUCTS AND DEFENSE OPERATIONS

Allison Gas Turbine
Delco Systems Operations
Electromotive

Military Vehicles Operations

TECHNICAL STAFF

Design Staff
Advance Product Manufacturing Engineering
Research Laboratories
Current Engineering Manufacturing Services
Worldwide Product Planning

PUBLIC AFFAIRS

Personnel Administration and Development
Environmental Activities
Industry/Government Relations
Public Relations
Legal Staff

OPERATING STAFF

Industrial Relations
Marketing Staff
Materials Management
Consumer Relations

FINANCIAL STAFF

Chief Economist's Staff
Financial

QUALITY AND RELIABILITY

GM Warehousing and Distribution
Quality and Reliability Staff

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

No. A-846

LARRY DODSON, et. al.,

Petitioners,

-vs-

GENERAL MOTORS CORPORATION,

Respondents.

PROOF OF SERVICE

I certify that a copy of the Petitioner's "Petition for a Writ of Certiorari to the United States Court of the Appeals for the Sixth Circuit" was delivered by U.S. Mail, postage prepaid, this 20th day of July, 1991 to the following:

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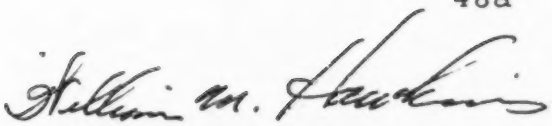

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(2)

No. 91 313

In The

Supreme Court of the United States

October Term, 1991

LARRY DODSON, ET AL,
Petitioners,
-vs-
DENNIS HAZEN HUGULEY, ET AL,
Respondents,
-and-
GENERAL MOTORS CORPORATION,
Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

ISSUE I

WHETHER THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'S ENTRY OF THE PROPOSED SETTLEMENT DECREE, WHICH PROVIDED FOR RELIEF PROPORTIONATE TO (1) THE ANTICIPATED RELIEF SHOULD PLAINTIFFS PREVAIL, AND (2) THE LIKELIHOOD OF SUCCESS?

ISSUE II

WHETHER THE COURT OF APPEALS ACTED WITHIN ITS DISCRETION WITH REGARD TO ALLOWING ORAL ARGUMENT AND WITH REGARD TO THE COURT'S CONSIDERATION OF MATTERS OUTSIDE OF THE TRIAL COURT RECORD?

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No. 91 313

In The

Supreme Court of the United States

October Term, 1991

LARRY DODSON, ET AL,

Petitioners,

-vs-

DENNIS HAZEN HUGULEY, ET AL,

Respondents,

-and-

GENERAL MOTORS CORPORATION,

Respondent.

BRIEF IN OPPOSITION

TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

COUNTERSTATEMENT OF FACTS

In July, 1983, respondents filed their first complaint (R.1: Complaint), in this race discrimination class action, with the United States District Court for the Eastern District of Michigan; the case was assigned to the Honorable John Feikens. Respondents' present counsel, Lopatin & Miller, P.C., was substituted as counsel for the putative class in May, 1985 (R.91: Appearance); Reosti & Hayes, P.C. filed as co-counsel in September, 1985. (R.95: Appearance as Co-counsel)

The Third Amended Complaint, the operative complaint in this litigation, was filed on February 24, 1986. At that time, the named plaintiffs were Dennis Huguley, Larry Kitchen, James Kennedy and Larry Dodson.

(R.126: Plaintiffs' Third Amended Complaint) This complaint charged that defendant-appellee (hereafter, defendant) General Motors discriminated against black salaried employees in Michigan, Indiana and Ohio, through the operation of its performance appraisal system, with regard to salary, promotional and other employment opportunities. (*Id.*)

The trial court certified the class through his opinion and order on July 21, 1986, and October 16, 1986, respectively. (R.154: Opinion; R.170: Order of Certification) The order certified a class of approximately 9800 persons who were: (1) black; (2) classified salary employees of defendant General Motors; (3) in the Michigan, Indiana and Ohio area; (4) employed between October 8, 1982 and September 25, 1986. (*Id.*)

Thereafter, the parties conducted extensive discovery, including eighty-seven (87) depositions and voluminous research and statistical analysis concerning over 100,000 computerized personnel files. (R.513: Response to Motion to Substitute Attorneys) Respondents' counsel has advanced over $200,000 in costs. (*Id.*) During this time, with some interruption, the parties conducted lengthy and complex negotiations.[1]

On October 21, 1988, three weeks before the scheduled trial, the parties reached an agreement in principle. (R.515: Memorandum Opinion Approving Consent Decree) The trial was adjourned to allow the litigants time to complete the details of the settlement, whereupon on February 1, 1989, they submitted a proposed consent decree to the court, with the approval of all four of the named plaintiffs including Larry Dodson. (R.374: Consent Decree; Dodson, Tr 6/26/89, 59) On Feb-

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[1] In litigation of this complexity, a litigation team represented each party; for ease of exposition, respondents refer to counsel or attorney in the singular.

ruary 3, 1989, the court issued its preliminary approval of the proposed Consent Decree. (R.373: Order of Preliminary Approval)

Thereafter, the class members were informed of the proposed decree, were granted access to free copies of the decree, and were invited to pose objections to the proposal over a sixty-day period, concluding on April 30, 1989. (R.463: Order Extending Time) The class members were advised of a special telephone number, connecting to paralegals and attorneys for the class, who could answer questions about the proposed decree. (James, Tr 6/26/89, 66; R.374: Consent Decree) The class' trial team handled hundreds of such inquiries during and after the objection period. (James, Tr 8/11/89, 42-43) The class counsel appeared at numerous mass meetings, called throughout the tri-state area in Detroit, Flint, Lansing, Indianapolis, and Youngstown, and continues to be available for class member meetings. (James, Tr 8/11/89, 42; Tr 5/3/89, 21)

By the end of the appeal period, 1,485 objections were filed; the vast majority were signatures on petitions. A hearing for objections was scheduled for June 26, 1989 (Status Conference 5/9/89), whereupon, on June 23, 1989, three days before the scheduled hearing, attorney Godfrey Dillard filed an appearance on behalf of named-plaintiff Larry Dodson and other objectors. (R.499: Appearance) At the hearing, approximately 200 objectors appeared, some accompanied by counsel. (Court, Tr 6/26/89, 6) For purposes of the hearing, at his request, Dillard was allowed by the court to speak for those objectors present without counsel. The court took the decree under advisement.

At the time of the hearing, over objections, the parties also submitted to the court the question of whether the decree, if approved, should have an opt-out

provision. The court decided that the decree, if approved, should not have an opt-out provision pursuant to the class's certification under F.R.Civ.P. 23(b)(2) and relevant case law. (Court, Tr 6/26/89, 86)

On August 3, 1989, Dillard filed a Motion for Substitution of Attorney moving to substitute himself as counsel for the class, which was heard August 11, 1989. (R.512: Motion to Substitute) On September 1, 1989, Judge John Feikens issued an Opinion Approving the Consent Decree and an Opinion and Order Denying Attorney Dillard's Motion for Substitution of Attorney. (R.515: Memorandum Opinion and Order; R.519: Order Denying Motion to Substitute) On September 14, 1989, the court signed an Order Approving Consent Decree, as well as Order Adding as Named Plaintiffs Robert Raglin of Columbus, Ohio and Darnita Stein of Flint, Michigan. (R.520: Order Adding Plaintiffs' R.21: Order Approving Consent Decree)

The consent decree is a sixty-two page (62) document (exclusive of exhibits) providing relief to the class in the following categories:

1. A backpay distribution of up to 4.6 million dollars to approximately 2800 ex-employee class members.

2. A first year distribution of approximately one million dollars in pay raises to those approximately 1,000 present class member employees whose pay is furthest out of line with their statistical white counter-parts.

3. A group monitoring system for promotions and pay which is to be in place for five (5) consecutive years. This computerized group monitoring system will benefit not only class members, but black salaried employees that plaintiff hired since the close of the class identification period on October 8, 1986.

4. The institution of an individual monitoring system which will allow employees to appeal their performance appraisals (now called relative contribution assessment) to a separate panel partially nominated by the employees.

5. Awards to named plaintiffs, anecdotal witnesses, and potential witnesses, totaling $325,000.

6. Payment by defendant of plaintiffs' fees of approximately $457,000 and costs in excess of $200,000.

On October 12, 1989, Dillard filed the Joint Notice of Appeal of the Order Approving Consent Decree of September 14, 1989. (R.522: Appeal Notice) No Notice of Appeal has been filed regarding the Order Denying Motion for Substitution of Counsel. To date, there has been no motion to intervene filed on behalf of any unnamed plaintiff. On November 20, 1989, attorney William Hawkins of Indianapolis, Indiana also filed an appearance on behalf of named plaintiff Dodson.

On November 2, 1989, respondents filed, *inter alia*, a Motion to Strike All or Part of Joint Notice of Appeal. This motion challenged: (1) the standing of any class member except Larry Dodson to prosecute an appeal in this case; (2) Dillard's authorization to prosecute an appeal on behalf of any objector other than Dodson; and (3) the standing of persons named in Dillard's appeal who had not filed objections, were not class members, or were duplicates. On January 22, 1990, the court granted respondents' motion in part, striking all nonobjectors, nonclass members and duplicate names, and directing Dillard to set forth in his opening brief, the authority by which he claims to represent plaintiffs-objectors on appeal.

On April 26, 1990, attorney William Hawkins and named plaintiff Larry Dodson filed documents dis-

missing Dillard and substituting William Hawkins as counsel for Dodson. To date, Dillard nas produced no written statements of objectors authorizing him to represent them on appeal. Attorney Hawkins has produced thirty (30) such statements, including that of Mr. Dodson; of these, four (4) are unsigned and five (5) are those of persons who have no filed objections.

On February 22, 1991, the United States Court of Appeals for the Sixth Circuit issued a *per curiam* opinion, affirming the trial court. The court below acknowledged that respondents had challenged the objectors standing to challenge the consent decree. Nevertheless, the court declined to address the standing issue, because it found that the merits of the issues raised were wholly without merit. (Opinion, 3) The court cautioned that its assumption of standing "is without consequence and should not be construed as a decision on the merits of the standing issue." (Opinion, 4)

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REASONS FOR DENYING THE PETITION FOR CERTIORARI

ISSUE I

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY AFFIRMED THE TRIAL COURT'S ENTRY OF THE PROPOSED SETTLEMENT DECREE, WHICH PROVIDED FOR RELIEF PROPORTIONATE TO (1) THE ANTICIPATED RELIEF SHOULD PLAINTIFFS PREVAIL, AND (2) THE LIKELIHOOD OF SUCCESS.

A. Introduction

Respondents perceive appellants as raising two objections, each of which is addressed. First, the trial court properly found that it was empowered to exercise its discretion not to insert an opt-out provision. Second, in view of the relief accorded by the consent decree, the potential award at trial, and the likelihood of success if this action were to proceed to trial, the trial court acted within its discretion in approving the consent settlement.

B. The Trial Court Acted Within Its Discretion In Denying Respondents' Request For An Opt-Out Provision.

Respondents sought certification under F.R.Civ.P. 23(b)(2) — not F.R.Civ.P. 23(b)(3). (R.144: Plaintiffs' Corrected Reply to Defendant's Supplemental Memorandum in Opposition to Class Certification; R.126: Third Amended Complaint, ¶ 33) Therefore, the trial court recognized, in certifying this case as a 23(b)(2) class, "Plaintiffs seek certification pursuant to Rule 23(b)(2) .... Accordingly I need not address the requirements of Rule 23(b)(3), (c)(2)." *Huguley* v. *General Motors Corp*, 638 F.Supp. 1301, n.1 at 1302 (E.D.Mich. 1986).

Undoubtedly, the trial court properly certified this class action pursuant to F.R.Civ.P. 23(b)(2). Indeed, the petitioners conceded this (Petition for a Writ of Certiorari to the United States Court of the [*sic*] Appeals for the Sixth Circuit, 25):

> "The Appellants [petitioners] acknowledge that this case was properly certified as a (b)(2) class action. Subsection (b)(2) contemplates class cases seeking equitable injunctive or declaratory relief, and back pay comes within the ambit of (b)(2) because the 'demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy, to be determined through the exercise of the court's discretion.' *Johnson* -v- *Georgia Highway Express*, 417 F.2d 1122, 1125 (5th Cir. 1969). See also *Pettway* -v- *American Cast Iron Pipe Co.*, 494 F.2d 211, 256-257 (5th Cir. 1974) (*Pettway III*), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979)."

Petitioners correctly state the law in this regard. It is well established that a Title VII class action seeking back pay is properly certified under Rule 23(b)(2). *E.g.*, *Alexander* v. *Aero Lodge No. 735, International Association of Machinists & Aerospace Workers, AFL-CIO*, 565 F.2d 1364, 1372 (6th Cir. 1977), *cert. denied* 436 U.S. 946, 98 S.Ct. 2849, 56 L.Ed.2d (1978); *Senter* v. *General Motors*, 532 F.2d 511, 525 (6th Cir. 1976), *cert. denied* 429 U.S. 870, 97 S.Ct. 182, 50 L.Ed.2d 150 (1976).

Accordingly, the trial court's decision not to grant an opt-out provision must be reviewed in the context of a class action certified under F.R.Civ.P. 23(b)(2). F.R.Civ.P. 23(b)(3) is simply irrelevant to this issue.

In express terms, F.R.Civ.P. 23(c)(2) requires an opt-out provision, only in a suit certified as a (b)(3) action,

not in a suit certified under Rule 23(b)(2). *Alexander* v. *Aero Lodge*, 565 F.2d at 1373 ("The mandatory notice provision of Rule 23[c][2] [containing notice of the right to opt out] is expressly confined by its terms to actions under [b][3], and a number of courts have indicated that actual prejudgment notice is not required by Rule 23 in actions certified under sections other than [b][3].") Similarly, no decision holds that an opt-out mechanism is essential in a rule (b)(2) case. *Laskey* v. *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW)*, 638 F.2d 954, 956-957 (6th Cir. 1981); *King* v. *South Central Bell Telephone & Telegraph*, 790 F.2d 524, 530 (6th Cir. 1986); *Dosier* v. *Miami Valley Broadcasting Corp*, 656 F.2d 1295, 1299 (9th Cir. 1981). Indeed, in *Laskey*, the Court squarely held that opt-out is not required, even in a case combining aspects of a Rule 23 (b)(2) class action and a Rule 23(b)(3) action. *Id.*, 956-957.

> "The notice of the pendency of the class action stated that all members would be bound and that each had the right to retain independent counsel and intervene as a plaintiff. This class action could be either brought under Rule 23(b)(2), Fed.R.Civ. Pro., which does not have the right to opt out, or under Rule 23(b)(3). In the interests of judicial economy and efficiency, the courts should treat the class as a Rule 23(b)(2) class. Thus, the failure to notify the class members of the right to opt out of the class is not a violation of due process." (Citations omitted)

Not only is there no requirement that an opt-out mechanism be provided in a (b)(2) action, there is dispute regarding whether the opt-out mechanism is permissible, with the circuit courts of appeal split on this issue. *Plummer* v. *Chemical Bank*, 668 F.2d 654, n. 2 at

657 (2nd Cir. 1982). On one point, however, there is no dispute: in a (b)(2) action, there is certainly no automatic right to an opt-out provision. *Laskey*, 638 F.2d at 956; *Penson* v. *Terminal Transport Co, Inc*, 634 F.2d 989, 993-994 (5th Cir. 1981); *Grigsby* v. *North Mississippi Medical Center, Inc*, 586 F.2d 457, 461 (5th Cir. 1975); *U.S.* v. *U.S. Steel Corp*, 520 F.2d 1043, 1057 (5th Cir. 1978), *cert. denied* 429 U.S. 817, 97 S.Ct. 61, 50 L.Ed.2d 77 (1977).

The remaining question, then, is whether the trial court, assuming that it is empowered to provide an opt-out mechanism in a (b)(2) action, abused its discretion in denying respondents' request for opt-out. Respondents did request an opt-out provision from the trial court, however they recognize that the trial court acted within its discretion in denying the request.

In *Kincade* v. *General Tire & Rubber Co*, 635 F.2d 501, 507 (5th Cir. 1981), the court gave three reasons for holding that "the right to opt-out, which is denied when a Rule 23(b)(2) class is tried, also need not be provided when such a case is settled." First, Rule 23 certification procedure ensures that the named parties will adequately represent the class. Second, F.R.Civ.P. 23(e), requiring court approval of all dismissals or compromises, gives additional judicial protection to the class members. Third, the public policy in favor of settlement is served by barring objectors from opting out. Here, where the trial court exercised its discretion in denying an opt-out provision, the *Kincade* reasoning serves to illuminate the basis for the trial court's decision.

Similarly, *Laskey*, 638 F.2d at 956, held that the procedures associated with a (b)(2) class action, with no opt-out mechanism, are preferred, stating, "In the interests of judicial economy and efficiency, the court should treat the class as a Rule 23(b)(2) class." *Accord: Wetzel* v. *Liberty Mutual Ins Co*, 508 F.2d 239, 253 (3rd Cir. 1975),

cert. denied 421 U.S. 1011, 95 S.Ct. 721, 54 L.Ed.2d 753 (1975) (holding that a Title VII action seeking injunctive, declaratory, and monetary relief which could be maintained "under both (b)(2) and (b)(3) should be treated under (b)(2) to enjoy its superior res judicata effect and to eliminate the procedural complications of (b)(3) which serve no useful purpose under (b)(2).")

In *Laskey*, 638 F.2d at 957, the court noted that a trial court's acceptance of a settlement is discretionary, subject to reversal only if there is an abuse of discretion.

> "The acceptance of a settlement in a class action suit is discretionary with the court and will be overturned only by a showing of abuse of discretion. *See Grunin* v. *International House of Pancakes*, 513 F.2d 114, 123 (8th Cir.), *cert. denied*, 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975); *Cohen* v. *Young*, 127 F.2d 721, 724-25 (6th Cir. 1942)."

Indeed, even where the named representatives of the class object, the reviewing court will affirm if no abuse of discretion is demonstrated. *Id.*

> "Accepting a settlement over the objections of the named representatives is not necessarily an abuse of discretion. *See Bryan* v. *Pittsburgh Plate Glass Co.*, 494 F.2d 799, 803 (3d Cir.), *cert. denied*, 419 U.S. 900, 95 S.Ct. 184, 42 L.Ed.2d 146 (1974); *Mungin*, *supra*, 318 F.Supp. at 731."

In *Spalding* v. *Spalding*, 355 Mich. 382, 384-385; 94 N.W.2d 810 (1959), the Michigan Supreme Court explained the "abuse of discretion" standard:

> "Where, as here, the exercise of discretion turns upon a factual determination made by the trier of facts, an abuse of discretion involves far more than a difference in judicial opinion between the

> trial and appellate courts. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias."

Although respondents urged the trial court to mandate an opt-out provision in the decree, respondents cannot reasonably contend that the trial court's exercise of discretion was so unreasonable as to constitute an abuse. There are almost 10,000 individuals in this class. If an opt-out mechanism is established, with even one percent of the class opting out, the trial court would be burdened with 100 additional cases. Thus, the trial court could reasonably conclude that the concerns for judicial economy and efficiency which originally lay behind its certification order would be largely destroyed by an opt-out clause.

Moreover, the complexity of the proposed consent decree arguably makes an opt-out procedure less warranted. The decree provides class-wide relief, that cannot be partitioned between the opt-ins and the opt-outs. (Court, Tr 6/26/89, 82) Individuals who choose to opt out would receive a free ride, gaining the benefit of the class-wide relief, such as group monitoring, *without* giving up their own claims for back pay, unlike their fellow class members who would give up these claims. Indeed, the trial court may have anticipated that the benefit of opting out — to have your cake and eat it too — could prove too attractive. Possibly, so many individuals would opt out as to undermine the entire settle-

ment process, even though the settlement is intrinsically fair and equitable. Accordingly, respondents respectfully submit that the trial court acted within its discretion in approving the settlement and must be affirmed.

It remains only to explicitly address and repudiate petitioners' contention that "the Sixth Circuit's decision in this case is in conflict with the Eleventh Circuit's," citing *Cox et al.* v. *American Cast Iron Pipe Co*, 784 F.2d 1546 (11th Cir. 1986). In *Cox*, two weeks after the class was certified, the judge resigned from the bench. Thereafter, the second judge authorized the defendants to notify the class members of a right to opt out. A third judge then assumed responsibility for the case and approved the opt-out procedure. The appellate court reversed, finding that the trial court had abused its discretion in approving the opt-out notice. Although some language within *Cox* serves petitioners, the language is, at most, dicta. The *Cox* court reversed the trial court, which had approved an opt-out procedure.

Petitioners also rely on *Holmes* v. *Continental Can Co*, 706 F.2d 1144 (11th Cir. 1983). There is no fundamental dispute between *Holmes* and the opinion below. The trial court below recognized its discretion to allow opt-out; however, upon an examination of the specific facts and circumstances of this action, the trial court declined to permit opt-out. The appellate court below affirmed this exercise of discretion. *Holmes* demands that the trial court exercise its discretion; it does not mandate an opt-out procedure.[2] The *Holmes* court noted, 706 F.2d at 1155:

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[2] The *Holmes* facts are radically different from those of this action. First, dissenters challenged the disproportionate payments to the named plaintiffs, contrary to the facts in this action. More

(*concluded on page 14*)

> "This court in *Penson* held that a district court 'acting under its Rule 23(d)(2) discretionary power, may require that an opt-out right and notice thereof be given should it believe that such a right is desirable to protect the interests of the absent class members.' 634 F.2d at 994. A district court's decision would only be reversed for abuse of discretion."

Petitioners announce a conflict between the Sixth Circuit's affirmance of the trial court and the Eleventh Circuit, although there is no such conflict. The trial court assumed that it had the discretion to include an opt-out provision, exercised its discretion, and declined to include the provision. The appellate court below affirmed, finding no abuse of discretion. At bottom, petitioners advocate a rule that mandates an opt-out provision whenever the case involves any monetary relief, regardless of the significance of the monetary relief. This is not the rule promulgated in *Holmes*, *Cox*, or any other decision of the Eleventh Circuit. Predicated upon its extensive review of the facts before it, the trial court declined to grant an opt-out option; there was no abuse of discretion; the issue raised by petitioners is not worthy of this Court's review.

(*continued from page 13*)

importantly, this action seeks and achieves (if the settlement decree stands) prospective relief with regard to promotion and merit pay, which far outweighs the monetary award for historical disparities. In *Holmes*, the action *de facto* involved only monetary relief, "[b]ecause the plants at which the bulk of the class and all of the named plaintiffs and objecting class members worked [had] been permanently closed." *Holmes*, 706 F.2d at 1146, n.1.

C. The Trial Court Properly Exercised Its Discretion In Approving The Consent Decree, In View Of The Specific Relief Provided By The Decree And The Likelihood Of Respondents Prevailing If No Settlement Is Reached.

The trial court found that the primary objection to the substantive provisions of the consent decree was that the monetary relief was inadequate. (R.515: Opinion, 9) Otherwise, the objections to the monitoring or affirmative relief were "largely conclusionary," and on the whole, "were stated in broad form and not precisely defined." (*Id.*, 14) A review of appellants' arguments to the court below, as to why the monetary and affirmative relief provided by the consent judgment is inadequate (Brief on Appeal [to the United States Court of Appeals for the Sixth Circuit], 39-45), confirms the trial court's opinion. Although petitioners appear to have abandoned some of their arguments, the Consent Decree can be evaluated only by consideration of all of its parts. Moreover, petitioners' argument for opt-out necessarily relies on the monetary relief aspect of this action, making this discussion pertinent to the discussion, *supra*, on the trial court's decision not to include an opt-out provision.

Adequacy of Monetary Relief

Petitioners complained to the appellate court below that the monetary relief is inadequate. (Brief on Appeal [to the United States Court of Appeals for the Sixth Circuit], 39) They did not, however, raise any specific objection to the distribution formulas used for allocating either the ex-employee fund or the incumbent employee awards. (Tr 6/27/89, 27) The adequacy of the monetary relief must be judged by examining the likelihood of success and the potential recovery if respondents should prevail.

Probability of Success

Petitioners argued below, based on the preliminary report of plaintiff's expert, Dr. Michael Thomson, that respondents would have prevailed. Such certainty is the province of armchair quarterbacks. Defendant's memorandum in support of approval of the consent decree (R.503) fully explained the uncertainty regarding the ultimate result, in the absence of a settlement.

Dr. Thomson's preliminary report was exactly that, preliminary. Although it described differences in the performance evaluations of black and white employees, it did not analyze the effect of performance levels on merit increases or promotions. It is precisely these effects which are the central focus of this case. Following the preliminary analysis, Dr. Thomson conducted additional statistical analysis. These studies were multiple regression analyses which used education, age, and tenure as the principal predictors (factors) for determining salary levels. Dr. Thomson performed several multiple regressions to test the difference between black and nonblack employees in discretionary salary increases and promotion rates. These results indicated the strengths and weaknesses of respondents statistical evidence of discrimination.

Respondents did not argue to the trial court, and do not argue here, that these statistical results were so weak that respondents settled this case for fear of losing the liability issue. In fact, respondents settled this case, because the settlement benefits to the class were substantial and were a very high proportion of the potential recovery (as explained below). Nevertheless, respondents necessarily considered the possibility that additional data regarding pre-employment work experience, starting salary, starting job category, and career path, might narrow the statistical differences found by Dr. Thomson.

More disturbing, however, were the studies performed by Dr. Thomson to test the connection between performance evaluation and merit pay and promotion. To some extent, these results were consistent with defendant's claim that there is no direct correlation between performance evaluations and promotions. Although respondents were certainly unwilling to concede defeat (nor was defendant prepared to proclaim victory), the results did present problems, especially in light of this Court's opinion in *Watson* v. *Fort Worth*, 487 U.S. 977, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988).

These initial concerns have been, of course, magnified by this Court's subsequent decision in *Wards Cove Packing Co* v. *Antonio*, ___ U.S. ___, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). In a disparate impact case, these decisions require proof of a nexus between the disparate statistical results and an identifiable employment practice.

Defendant, in its memorandum to the trial court, included a long list of reasons why respondents' case might fail, in the absence of settlement. Although respondents did not, and do not agree with defendant's analysis, respondents must accept the possibility that defendant might prevail on one or more of its defenses, if this action were tried.

Respondents would have, for instance, as defendant observed, been required to concede that performance evaluations systems are a useful business tool in making personnel decisions. Respondents would also have to concede that defendant's performance evaluation system was sophisticated, representing the "state of the art." While not agreeing that such admissions would necessarily have led to defeat, in light of the Supreme Court's decision in *Wards Cove*, it is inescap-

able that respondents would face significant uncertainty with regard to the ultimate result.[3]

Potential Recovery

The relief negotiated for the class represents a substantial percentage of the possible recovery if respondents had prevailed. Because the actual total recovery would depend on the outcome of thousands of individual claims hearings,[4] it is impossible to estimate the actual total recovery to class members. However, it is possible to statistically estimate the total amount of the difference in salary growth for black and white employee which could be attributed to race, as opposed to education, age, tenure, etc. This would arguably equal the total amount of money lost by the class during the years in question, as a result of discrimination in merit pay and promotions.

As explained in Plaintiff's Answer to Common Objections to the Proposed Consent Decree (R.501), this estimate was based "on multiple regression analysis of the difference in the growth in salaries for black employees compared to the growth in salaries of comparable white employees, during the period covered by this case. Comparability was defined in terms of age, education, company seniority, and to a limited extent company experience." (*Id.*, 2) Petitioners do not complain that this method underestimates the potential recovery.

Petitioners simply reject respondents conclusion that the amounts provided in the consent judgment are a

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[3] The decision in *Wards Cove Packing Co* v. *Antonio*, ___ U.S. ___, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989), appears to allow the defendant to defeat a *prima facie* case of disparate impact by a lesser showing of business necessity.

[4] The numer of individual claims hearings that would be necessary if plaintiffs prevailed is an additional factor which supports the decision to settle the case.

"substantial percentage of Defendant's total exposure. . . ." (*Id.*, 3) In other words, the objectors believe that the potential recovery is many times the amount negotiated by the class representatives.

Petitioners fail to understand that the difference in merit pay, while statistically significant, involves a fraction of a percentage point. Further, while promotions are individually worth much more than merit pay increases, they are, relatively speaking, rare events. Petitioners have not contested these assertions. However, although they apparently accept the analysis as reasonable, they continue to assert that trial would necessarily result in a recovery to the class, which make the amounts obtained through the consent judgment inadequate. This is unexplainable.

Dr. Michael Thomson's estimates of the potential recovery to the class, should respondents prevail on liability, indicated that the amounts negotiated for the class was a substantial percentage of the estimated potential recovery as described above.

Merit increases are generally in the range of four to six percent for all employees. A difference of .002 or two tenths of one percent in the merit increases of black and white employees would be highly significant. However, this difference would amount to a difference of only $70.00 in anual salary, based on an annual salary of $35,000.00.

The impact of being passed over for promotions is obviously much greater. Respondents' studies showed that promotions would, on average, increase an employee's salary between $2,000 and $3,000 (depending on the year in which the promotion occurred). However, promotions were rare events. In any year, excluding automatic, nondiscretionary promotions, less than ten percent of the employees would be promoted. A differ-

ence of two percent in promotion rates would be highly significant. However this would result in a shortfall of only approximately 150 promotions which should go to black employees.

In addition to overestimating the potential recovery at trial, appellants have also understated the actual recovery in the consent decree, by ignoring or misstating two other important facts.

First, with regard to the ex-employees, although there are approximately 2,800 former employees, only a small minority were present for the entire period covered by the lawsuit. In fact, there were less than 5,000 years of service for this subgroup, an average of less than 1.8 years. Thus, although the average recovery is $571.00 (see, Appellant's Brief on Appeal [to the United States Court of Appeals for the Sixth Circuit, by Godfrey J. Dillard], 3), this equals an average loss of $317.00 per year.

This represents a difference in the rate of salary growth, on average, of approximately .0075 percent (¾ of one percent) per year. In other words, if white salaries increased an average of six percent per year during this period and black salaries increased at a rate of 5.25% per year, then 2,800 employees with an average tenure of 1.8 years would lose approximately $1.6 million. (This amount is an overall increase, which includes both promotion and merit increases.) In only one year did the difference in rate of growth, when controlled for differences in education, age, and tenure, exceed one percent and in that year the figure was 1.16%.

The second fact that petitioners overlooked is the cumulative effect of the amount negotiated for the incumbent class. The average incumbent award is $1,000, a total of $1,000,000 for this subclass. However

this amount is added to their base salaries. A conservative estimate of the value of this fund is $10,000,000. (This excludes the effect on future percentage increases and on pensions.) As a result, the total monetary recovery is more than fifty percent of the total exposure estimated as explained above.

This award will be distributed to the fourteen percent of the class whose salaries are furthest from what would be predicted, based on the employees' education, age, tenure and company experience. The decision to distribute this fund in this manner was based on the statistical analysis which indicated that the discrimination uncovered did not affect all black employees and was primarily due to the nonpromotion of blacks at certain pay levels. Petitioners have not challenged either the concept that the consent judgment should attempt to identify the most probable victims of discrimination, nor the method chosen to accomplish this goal.

In short, the total amount negotiated on behalf of the class is a substantial percentage of the total estimated recovery. The method of distributing these amounts has not been challenged by petitioners and is eminently fair and reasonable.

Monitoring

Petitioners' other argument is that the affirmative relief is also inadequate. This argument appears to be made, because the trial court pointed to the monitoring or affirmative relief as the central justification for his approval of the consent decree. In the appellate court below, the two group of appellants (one of whom is now "petitioners") did not agree on the purported inadequacy of the affirmative relief. One group of appellants below (not petitioners) argued that it is inadequate, because it doesn't contain a specific performance evaluation scheme to replace the objectionable procedure.

This group did not contest the effectiveness of the group monitoring plan in terms of the "bottom line."

Petitioners apparently complain that the group monitoring is per se inadequate, because it is allegedly similar to the plan agreed to by the defendant and the Office of Federal Contract Compliance (OFCC). They argue that since the OFCC plan did not prevent discrimination, the group monitoring scheme cannot be expected to do so. (Hawkins Brief on Appeal [to the United States Court of Appeals for the Sixth Circuit], 45; Petition for a Writ, 29) Petitioners also complain that the consent decree is inadequate, because it does not guarantee that defendant's "utilization" of minorities will "approximate minorities in the community." (Hawkins Brief on Appeal [to the United States Court of Appeals for the Sixth Circuit], 46; Petition for a Writ, 29-30)

Those appellants below (not petitioners herein) were correct that the group monitoring plan cannot identify individual cases of disparate treatment, and that a balanced "bottom line" could easily include several cases of individual discrimination. However, the individual monitoring provision, ignored by appellants, addresses this problem in a realistic and forceful manner. Further, class members retain their right to sue for future individual acts of discrimination.

Respondents' experts, the statistical analysis, and the anecdotal testimony all support the conclusion that the main problem with defendant's evaluation system was not its design, but the ability of supervisors to exercise conscious and unconscious bias. The affirmative relief addresses this problem in three ways: first, the individual monitoring system will provide a means to identify individual examples of bias; second, the group monitoring sanctions provide powerful incentives to defendant to identify and correct recurring problems

stemming from supervisory bias; and, third, the class members retain their right to bring individual suits for discrimination in pay or promotion.

In fact, the individual monitoring section is a substantial change in the performance evaluation system. More importantly however, the group monitoring proposal is not only innovative but is a real breakthrough in the area of affirmative action. The system, by using computers and multiple regression analysis, allows the parties to agree on the commonly accepted "predictors" of success for large groups. Almost all experts, whether testifying for employees or employers or writing academic articles, agree that in large groups of employees, education, company experience, and prior work experience, are legitimate indicators of success within the company. The consent decree recognizes that the rewards for black and white employees should relate to these factors. And, in the event the performance evaluation system and the subsequent decisions regarding pay and promotion do not bear a statistically predictable correlation to those factors, the decisions are suspect and should be adjusted to correct the statistical imbalance. One cannot perceive of a more forceful inducement for defendant to increase its training and its own monitoring of the performance evaluation system, to insure that minorities are treated fairly.

Petitioners' complaint that the OFCC plan is substantially similar to the affirmative relief in the instant case is simply not true. The OFCC plan is based on multilevel job groups. In other words it evaluates the rate at which black and white employees are promoted to and from certain job groups. It does not address the probability that black or white employees will be in such job groups to begin with. Nor does it identify the problem of blacks being concentrated at the bottom levels of

each group. Further, to assume that this settlement will fail in achieving its objectives, because the OFCC may have failed in achieving similar objectives is not supported by evidence or logic.

Petitioners' argument that the consent judgment is inadequate because it doesn't guarantee that defendant's utilization of minorities will not approximate minorities in the community simply reflects an ignorance of the legal standards applicable to this case. See *Wards Cove*.

ISSUE II

THE COURT OF APPEALS ACTED WITHIN ITS DISCRETION WITH REGARD TO ALLOWING ORAL ARGUMENT AND WITH REGARD TO THE COURT'S CONSIDERATION OF MATTERS OUTSIDE OF THE TRIAL COURT RECORD.

In view of petitioners' cursory treatment of this issue, respondents will be brief.

Petitioners baldly assert that they were denied due process of law, because the United States Court of Appeals for the Sixth Circuit denied oral argument. Respondents are perplexed by this assertion, inasmuch as there was oral argument on January 22, 1991. Moreover, petitioners cite no authority for the proposition that there is a constitutional right to oral argument; respondents know of no such authority.

Petitioners also baldly assert that they were denied due process of law before the United States Court of Appeals for the Sixth Circuit due to the "denial of . . . documentation (National Reporting System–NRS) which would support Petitioner's and Objectors position." It appears that petitioners are contending that the court below failed to permit them to enlarge the record. Again, petitioners cite no authority for the proposition

that there is a constitutional right to enlarge the record upon appeal and require the appellate court to consider matters not raised in the trial court; respondents know of no such authority.

Moreover, petitioners did present argument to the court below with regard to the agreement between General Motors Corporation and the Office of Federal Contracts Compliance Programs. (Plaintiffs/Appellants' Brief [to the United States Court of Appeals for the Sixth Circuit, 45) Further, respondents answered petitioners argument on this subject. (Plaintiffs-Appellees' Brief on Appeal [to the United States Court of Appeals for the Sixth Circuit], 41-43) Thus, the Court of Appeals below was presented with substantial information regarding the OFCC plan, notwithstanding that petitioners injected this information into this case for the first time at the appellate level.

Accordingly, respondents respectfully submit that petitioners have failed to demonstrate that the United States Court of Appeals for the Sixth Circuit acted so as to deny petitioners of due process of law; the petition for certiorari should be denied.

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RELIEF

WHEREFORE, respondents herein, DENNIS HAZEN HUGULEY et al., by and through their attorneys LOPATIN, MILLER, FREEDMAN, BLUESTONE, ERLICH, ROSEN & BARTNICK, and their attorneys REOSTI & HAYES, respectfully pray that this Honorable Court deny petitioners Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, together with costs and attorneys fees.

Respectfully submitted,

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DATE: September 10, 1991

(3)

No. 91-313

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LARRY DODSON, *et al.*,
Petitioners,

v.

GENERAL MOTORS CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT GENERAL MOTORS CORPORATION'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the courts below abuse their discretion when, based on the facts of this case, they approved a Rule 23(b)(2) class action settlement that provides principally for class-wide equitable relief and does not permit class members to opt out?

PARTIES TO THE PROCEEDING BELOW

The parties to this proceeding in the court of appeals were: Plaintiffs-Appellees Dennis Hazen Huguley, James Kennedy, Larry Kitchen, Darnita Stein, and Robert Raglin, on behalf of themselves and others similarly situated; Plaintiff-Appellant Larry Dodson (purporting to represent a group of unnamed nonparty objectors to the Consent Decree); and Defendant-Appellee General Motors Corporation.

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IN THE

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT GENERAL MOTORS CORPORATION'S BRIEF IN OPPOSITION

Respondent General Motors Corporation ("GM")[1] respectfully requests that this Court deny the petition for a

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[1] Pursuant to Rule 29.1 of the Rules of this Court, GM lists the following affiliates and non-wholly owned subsidiaries: Aralmex, S.A. de C.V. (Mexico); Automotriz Gencor S.A. (Ecuador); Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador); Companis Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico); Compresores Delfa, C.A. (Venezuela); Convesco Vehicle Sales GmbH (Germany); Daewoo Motor Co., Ltd. (Korea); DHB-Componentes Automotives S.A. (Brazil); Fabrica Colombians de Automotores S.A. ("Colomotores") (Colombia); General Motors de Colombia S.A. (Colombia); General Motors Egypt, S.A.E. (Egypt); General Motors Iran Limited (Iran); General Motors Kenya Limited (Kenya); GM Allison Japan Limited (Japan); GM Fanuc Robotics Corp. (USA); Industries Mecaniques Meghrebires, S.A. (Tunisia); Industrija Delova Automobils, Kikinda (Yugoslavia); Isuzu Motors Limited (Japan); Isuzu Motors Overseas Distribu-

writ of certiorari, seeking review of the Sixth Circuit's opinion in this case. That *per curiam* opinion is unreported, and is reprinted in the Petitioners' Appendix ("Pet. App.") at 27a-33a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent supplements Petitioners' listing of constitutional and statutory provisions involved with the following, reprinted in Respondent's Appendix ("Resp. App.") at 4a-7a:

Rule 23 of the Federal Rules of Civil Procedure;

Rule 10(a) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE CASE[2]

Background

This broad-based race discrimination class action was brought on behalf of a class of approximately 10,000 black incumbent and former salaried employees of GM, who claimed that the GM salaried employee performance appraisal system discriminated against blacks in promotion, pay, and other terms and conditions of employment.

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tion Corp. (Japan); Kabelwerke Reinshagen GmbH (Germany); Kabelwerke Reinshagen Werk Berlin GmbH (Germany); Kabelwerke Reinshagen Werk Neumarkt GmbH (Germany); Moto Diesel Mexicana, S.A. de C.V. (Mexico); Motor Enterprises, Inc. (USA); New United Motor Manufacturing, Inc. (USA); Omnibus BB Transportes, S.A. (Ecuador); Promotora de Partes Electronicos Automotrices (Mexico); P.T. Mesin Isuzu Indonesia (Indonesia); Senalizacion y Accessorios del Automobil Yorka, S.A. (Spain); Suzuki Motor Co., Ltd. (Japan); Unicables, S.A. (Spain). GM has no parent company.

[2] The opinions below are reprinted in Petitioners' Appendix at 3a-33a, and fully summarize the factual and procedural background of this case. Substantial portions of these opinions also appear as unattributed quotations in the "Statement of the Facts" and "Proceedings Below" sections of the Petition. *See* Pet. at 17-23.

After more than five years of vigorous litigation, the case was settled just prior to trial. The parties' agreement was embodied in a Consent Decree providing extensive equitable and other relief to the class. The heart of the Decree is the class-wide equitable relief it provides, which includes:

—A complex computer monitoring system that will statistically track promotions and salary increases for incumbent class members during the five-year life of the Decree, and a commitment to redress any statistically significant shortfalls for blacks in these areas, as identified through the monitoring process;

—Monitoring and review of employee complaints regarding individual performance appraisals;

—Detailed recordkeeping by GM with respect to all aspects of the Decree, as well as annual reports to class counsel, to monitor GM's compliance with the Decree.

The Decree also requires increases in base salary for approximately one thousand incumbent class members, one-time monetary awards to approximately 2,800 ex-employee class members, and payment of class attorneys' fees and costs. It does not provide a mechanism by which members of the class (which was certified under Rule 23(b)(2) of the Federal Rules of Civil Procedure) may opt out of the settlement.

The parties submitted the Consent Decree to the district court for approval, and written notice of the proposed settlement was mailed to all class members, who were given more than two months to submit written objections to the court. Pursuant to this procedure, approximately fifteen percent of the class submitted signed petitions and/or brief comments on the proposed settlement.[3] A fairness hearing then was held, during which

[3] Certain objections were addressed by the parties prior to the fairness hearing. For example, the Decree was amended to clarify

objectors, many of whom were represented by counsel, were permitted to present their objections orally to the court. Following the hearing, the court took the Decree under advisement.

The Decisions Below

On September 1, 1989, the district court issued an opinion approving the Consent Decree. The judge, who had been supervising this litigation from its outset, carefully examined the provisions of the settlement negotiated by the parties, along with the various objections to it, and determined that the Consent Decree was fair, adequate, and reasonable. He determined that the extensive equitable and other relief provided by the Decree was appropriate, particularly in light of the uncertainty as to what, if anything, plaintiffs would recover if this complex case were tried. The judge found that the heart of the Decree was the class-wide equitable relief embodied in the monitoring system and related provisions and that the monetary relief provided was of secondary importance. In this regard, the court found that "[t]he complaint of race discrimination in the appraisal system is met and resolved through this adjustment system of monitoring discretionary salary increases and promotions." Pet. App. at 7a. Because of the nature of this Rule 23(b)(2) action and the extensive class-wide equitable relief provided by the Decree, the judge, in his discretion, declined to permit dissatisfied class members to opt out of the settlement.

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that class members are not precluded from pursuing claims, including claims of retaliation, arising after the effective date of the Decree. The language of the Decree also was clarified to ensure that relief for ex-employees would not exclude class members who had been involuntarily terminated by GM.

A number of objectors complained of the lack of an opt out provision in the Decree. This issue, as discussed more fully below, was carefully considered by both of the courts below before approving the Decree.

The Sixth Circuit carefully analyzed the factual and procedural background of this case in affirming the district court's approval of the Decree in general and its denial of opt out in particular. The court concluded that an opt out provision here would defeat the goals of judicial economy and efficiency that support class certification under Rule 23(b)(2). The court also concluded that permitting opt out would have eliminated any incentive for GM to settle this class action. Pet. App. at 30a-31a. As GM argued below, an opt out procedure would render the Consent Decree essentially unworkable and grossly unfair, because the primary relief sought in this case (and the primary relief provided in the Consent Decree) is equitable relief. The relief provided by the Decree is designed to benefit *all* incumbent black employees, and the monitoring formula is based on the characteristics of the whole employee population. Thus, individuals permitted to opt out, unlike their fellow class members, would receive the benefit of the decree *without* giving up their own individual claims. Furthermore, any attempt to exclude class members who opted out from the group and individual monitoring relief would be an insurmountable administrative burden and would impair the entire monitoring process.

The court therefore held that it was not an abuse of discretion for the district court to deny opt out. In so holding, the court noted generally that "[t]here is no absolute right to opt out of Fed. R. Civ. P. 23(b)(2) class actions." *Id.* at 30a. It did *not* hold that an opt out provision can *never* be appropriate in a Title VII class action. Rather, the court held simply that in *this* class action, denial of opt out was an appropriate exercise of judicial discretion.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE SIXTH CIRCUIT'S HOLDING THAT IT WAS NOT AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO APPROVE A CONSENT DECREE WITHOUT AN "OPT OUT" PROVISION IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

The sole issue of substance raised by the Petitioners here—an alleged split among the circuits[4]—is not presented by this record, because the Sixth Circuit did not hold that opt outs are not proper in Rule 23(b)(2) cases. Rather, the Sixth Circuit's decision (like the decisions of other appellate courts that Petitioners claim are in conflict with it) relies on the well-settled principle that whether to allow opts out in such a case is a matter committed to the discretion of the district judge supervising the action.

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[4] This "split among the circuits" argument, while lacking merit, is Petitioners' only argument that is even worthy of the Court's consideration. For example, the contention that the Sixth Circuit's approval of the Consent Decree denied Petitioners due process and equal protection, which surfaced fleetingly in the first of Petitioners' Questions Presented, was abandoned by Petitioners themselves.

The notion that a split of authority is created by the lower courts' general approval of the Consent Decree—also suggested in the first Question Presented—is equally unworthy of serious consideration. Whether to approve a class action settlement is an extremely fact-sensitive question. Here, both the trial and appellate courts applied well-settled legal standards to the facts of this case and concluded that the Consent Decree should be approved as fair, adequate, and reasonable. Other courts, on different facts, have found that other decrees did not meet this standard. This, of course, does not make such decisions inconsistent with the decision below, nor does it give rise to a "conflict" that this Court must intercede to resolve.

Finally, the second of Petitioners' Questions Presented—whether the Sixth Circuit improperly excluded certain documentation from the record on appeal—relies on a mischaracterization of the proceedings below and also should be disregarded. *See infra* note 12.

Petitioners'[5] claim, that "[t]he Sixth Circuit's decision [not to permit opt out]in this case is in conflict with the Eleventh Circuit's [decisions permitting opt out]," Pet. at 24 (citing *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir.), *cert. denied*, 479 U.S. 883 (1986), and *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983)),[6] cannot withstand even minimal scrutiny. A fundamental tenet of the holding below, and of every case that has addressed the opt out issue in a Title VII class action, is that Rule 23(b)(2) class members have no absolute right to opt out. This basic principle flows directly from the language and structure of Rule 23 itself. Rule 23(c)(2) provides that notice of a right to opt out is *mandatory* in class actions certified under Rule 23(b)(3). In contrast, Rule 23 contains no such express requirement for class actions, like this one, certified under Rule 23(b)(2). Whether to give class members notice of the class action, as well as the content of such notice, is left to the discretion of the district court in non-23(b)(3) actions. *See* Fed. R. Civ. P. 23(d)(2). Consistent with the plain language of the Rule, no court of appeals, including the Eleventh Circuit,

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[5] Except for Larry Dodson, who was a named party in the district court and in the court of appeals, the Petitioners named herein are not properly before this Court. As GM argued in the court of appeals, unnamed class members who, like Messrs. Adams, Lawrence, and Smith, failed to intervene as parties at the district court level lack standing to challenge a consent decree on appeal. The Sixth Circuit, given its decision on the merits, found it unnecessary to address the standing issue. *See* Pet. App. at 29a-30a.

[6] Apparently, Petitioners rely chiefly on the *Holmes* case, since their opt out argument consists mainly of lengthy, unattributed quotations from the *Holmes* opinion. *See* Pet. at 24-27. Included in one such passage is the observation that "the United States Supreme Court has not yet decided whether opting out of Rule 23(b)(2) classes is ever permissible." Pet. at 26. This of course does not help Petitioners, as the fact that a question has not been resolved by this Court has never been a recognized basis for a grant of certiorari.

has held that opt out must be permitted in *every* 23(b)(2) class action.

The cases relied on by Petitioners all have recognized that opt out is not required in Rule 23(b)(2) cases. *See, e.g., Holmes*, 706 F.2d at 1153 ("The general rule in this circuit remains that absent members of (b)(2) classes have no automatic right to opt out of the lawsuit and to prosecute an entirely separate action."); *Penson v. Terminal Transport* Co., 634 F.2d 989, 994 (5th Cir. Unit B Jan. 1981) (In the Fifth Circuit, "a member of a class certified under Rule 23(b)(2) has no absolute right to opt out of the class, even where monetary relief is sought and is made available.").[7] These cases have held simply that district courts in appropriate cases *may* permit class members to opt out of Title VII class actions, subject to appellate review under an abuse of discretion standard.[8] While the Sixth Circuit has not expressly adopted this view of opt out under Rule 23(b)(2), neither has it rejected it. In fact, the Sixth Circuit here reviewed the district court's decision under the *Holmes* "abuse of discretion" standard in concluding that the district court had acted within its discretion in denying opt out.[9] Thus, the legal principles underlying the decision below and the

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[7] *Penson's* statement of the rule of law in the Fifth Circuit was based on a survey of Fifth Circuit cases, including *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974), on which Petitioners also rely. *See* Pet. at 25.

[8] The district court below took this approach as well. Regarding the determination whether to permit opt out in a Rule 23(b)(2) class action, the court stated: "I think that under the case law as I read the rule, that is discretionary." *See* Jan. 31, 1989 Hearing Transcript at 3, *quoted in* Petition at 7. The district court thus recognized that the law of the Sixth Circuit did not preclude such an approach, and the Sixth Circuit, of course, did not disagree.

[9] Even assuming *arguendo* that the opinion below leaves open the possibility that the Sixth Circuit might reject the *Holmes* view in some future case, there still exists no more than a *potential* con-

decisions relied upon by Petitioners are perfectly consistent.[10] There is no "conflict" created here that requires Supreme Court review of the opt out issue.[11]

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flict among the circuits. The state of the law in the lower federal courts, even viewed in the light most favorable to Petitioners, simply is insufficiently developed to create a true conflict or to frame this issue adequately for consideration by this Court.

Even if the decision below could be read as creating a direct conflict, the limited precedential value of this unpublished opinion, *see* 6th Cir. R. 24, would militate against granting the Petition.

[10] Petitioners' authorities are also factually distinguishable from the present case. For example, in *Holmes*, on which Petitioners principally rely, prospective equitable relief was *not* predominant. The *Holmes* decree provided for some prospective relief, but at the time the case was decided, the facilities at which all the named plaintiffs and the great majority of class members had been employed had been permanently shut down; thus, the prospective relief was essentially moot, and all that was at issue on appeal was the allocation of monetary relief. *See* 706 F.2d at 1146 n.1. The case thus resembled a Rule 23(b)(3) action much more than a 23(b)(2) action. This stands in stark contrast to the present case, where the courts below have found that the Decree's broad prospective relief is the crux of the parties' settlement and that monetary relief is of secondary importance.

In *Penson v. Terminal Transport Co.*, the consent decree in question required notice of an opt out right, but the notice that Mr. Penson received did not so inform him, due to an error in the form of the notice. *Penson* thus did not present the issue of the propriety of opting out of a Rule 23(b)(2) action, and, like *Holmes*, is inapposite.

In *Cox v. American Cast Iron Pipe Co.*, the issue on appeal was whether opt out should be permitted prior to the monetary relief stage of a class action "pattern or practice" trial. Thus, it too is inapposite and is not in conflict with the decision below. The same is true of *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983), where opt out was permitted in an action that was certified under Rule 23(b)(2) *and* (b)(3) and was treated as a 23(b)(3) action in the district court.

[11] Even if this Court agreed that the "conflict" urged by Petitioners exists and granted the Petition, it would make no difference

II. BECAUSE THE DECISION BELOW DOES NOT CREATE A SPLIT AMONG THE CIRCUITS AND PRESENTS NO ISSUE OF LAW FOR RESOLUTION BY THIS COURT, THE ONLY ISSUE TRULY PRESENTED HERE IS WHETHER THE DISTRICT JUDGE, GIVEN THE FACTS AND CIRCUMSTANCES OF THIS CASE, ABUSED HIS DISCRETION IN APPROVING THE CONSENT DECREE; THE SIXTH CIRCUIT CORRECTLY HELD THAT HE DID NOT.

As demonstrated above, there is no split among the circuits on the question whether an opt out provision in a consent decree settling a Rule 23(b)(2) class action is ever permissible. Nor is there any other issue of law presented for resolution in this case, because the courts below merely applied the well-settled "fair, adequate, and reasonable" standard to the complex facts of this case in determining that the parties' settlement of this class action should be approved and implemented.[12]

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in the outcome of this case. As noted above, the Sixth Circuit assumed *arguendo* that the *Holmes* "abuse of discretion" standard urged by Petitioners applied here, and it analyzed the facts of this case under that standard. The court rightly concluded that the district court acted well within its discretion in approving the Consent Decree without providing an opt out mechanism for dissatisfied class members. Thus, even if this Court were to grant review, reverse the decision below, and remand to the Sixth Circuit for consideration under the "proper" rule of law, nothing ultimately would change. The resources of this Court should not be mobilized to decide a question that will make no difference in the outcome of the case before it. For this additional reason, the Petition should be denied.

[12] Petitioners purport to raise a "due process" issue by challenging the court of appeals' "denial of oral arguments and documentation (National Reporting System—NRS) which would support Petitioner's and Objectors position." Pet. at 32. This is a non-issue that this Court should disregard. The Sixth Circuit in fact accepted the NRS Agreement in question, as part of Plaintiffs-Appellants' Joint Appendix. *See* Resp. App. at 1a (Order of Dec. 20, 1990); Resp. App. at 2a-3a (excerpts from Appellants' Joint

Therefore, the only question truly presented by this case is whether, under these facts, approving the Decree without providing for opt out was an abuse of discretion. But examination of such a fact-bound issue (particularly under the deferential abuse of discretion standard) is an exercise unworthy of this Court's time and attention, as it is well settled that this Court "[does] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

In any event, there was no abuse of discretion here. The courts below correctly found that class-wide equitable relief is the crux of this settlement. GM's commitment under the monitoring system to respond to any statistically significant race-based differences in pay levels and promotions is a remedy for all incumbent class members. Class members permitted to opt out and pursue individual claims, however, still would benefit from this significant systemic relief. As noted above, *see supra* p. 5, this result would be unfair to both GM and the class

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Appendix). The court did so despite GM's argument that this document and the objectors' arguments relating to it (which were being introduced for the first time on appeal) were not properly before the court. In addition, most of Mr. Hawkins' oral argument before the Sixth Circuit panel dealt with the same NRS-related issues he now raises in the Petition. Thus, the denial of due process Petitioners complain of was not a "denial" at all, and does not justify issuance of the writ.

Even if the court had excluded the NRS Agreement, such a ruling would simply have been a straightforward application of the rule excluding from the record on appeal any evidence that was not part of the record in the district court. *See* Fed. R. App. P. 10(a). This would have been an unassailable exercise of the court's discretion, providing no basis whatsoever for granting the Petition.

In any event, the NRS Agreement raises no more than a minor factual issue encompassed within the court's general determination that the Consent Decree is fair, adequate, and reasonable. To the extent there is a cognizable issue here at all, it is not a question of law and certainly is not of sufficient importance to justify review by this Court.

and would render the Decree essentially unworkable. Given the breadth and the predominantly equitable nature of the relief provided by the Decree, the Sixth Circuit was correct in stating that an opt out requirement in this case would have undermined settlement by eliminating any incentive for GM to enter into a consent decree at all. Thus, these were perfectly appropriate circumstances for the district court, in its discretion, to approve certification and settlement under Rule 23(b)(2) without providing for opt out. It was not an abuse of that discretion to do so.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DENNIS HAZEN HUGULEY, *et al.*, (Class Action),
Plaintiff-Appellee

LARRY DODSON, *et al.*, (Objectors—Class Action),
Plaintiff-Appellant

v.

GENERAL MOTORS CORPORATION,
Defendant-Appellee

ORDER

[Filed Dec. 20, 1990]

Upon consideration of the stipulation of attorneys Dillard and Hawkins to file (together) a joint appendix with the court, and the response of appellant Dodson in opposition thereto,

It is ORDERED that the motion be, and it hereby is, granted.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DISTRICT

APPEAL TO THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Court of Appeals No. 89-2172

District Court 83-2864

DENNIS HAZEN HUGULEY, *et al.*, (Class Action),
Plaintiffs/Appellees,

LARRY DODSON, *et al.*, (Objectors—Class Action),
Plaintiffs/Appellants,

-vs-

GENERAL MOTORS CORPORATION,
Defendant/Appellee.

JOINT APPENDIX

VOL. IV

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Case No. 89-2172

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National Reporting System for General Motors Corporation	1-1122

SUPPLEMENTAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 23, Federal Rules of Civil Procedure

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those

whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 10(a), Federal Rules of Appellate Procedure

Rule 10. The Record on Appeal

(a) Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.